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In The

Supreme Court of the United States

October Term, 1995

THE JONES-BLAIR CO. and THE O'BRIEN CORPORATION,

Petitioners,

vs.

THE HARDAGE STEERING COMMITTEE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. When counsel for two *de minimis* parties states on-the-record that his clients do not authorize settlement and the district court orders a settlement nonetheless although no party asked him to do so, does the judge's statement that "[t]he Court is not about to undertake a trial of this magnitude and size on behalf of two *de minimis* parties" indicate the appearance of bias or adverse predisposition requiring recusal under 28 U.S.C. § 455 when the case is remanded by the Court of Appeals to determine if a settlement arose?

II. Has a district court in a federal environmental case impermissibly created a new federal law of settlement that negates state law when: (a) liaison counsel, the one person the district court said was authorized to settle on Petitioners' behalf, testified he did not do so; (b) Petitioners' counsel stated in court on-the-record that his clients wanted their day in court and did not want to settle; (c) state statutory law requires that "consent of the parties to a [settlement] be free, mutual and communicated by each to the other," and the record shows none of these criteria are present; and (d) nonetheless, the court finds a settlement was reached while ignoring the state statutory right to rescind or revoke any settlement allegedly reached over counsel's objection?

III. Has the district court impermissibly established a new federal law of settlement that negates state law and constitutional due process when, over Petitioners' counsel's in-court objections that his clients do not authorize a settlement and wish their day in court, the district court relies on a letter written to liaison counsel six days earlier for authority to order a settlement?

LIST OF PARTIES

The Jones-Blair Co. and The O'Brien Corporation, Petitioners named in the caption were third party defendants and appellants below.

Neither the Jones-Blair Co. nor The O'Brien Corporation have parent companies nor subsidiaries.

Respondent, Hardage Steering Committee ("HSC"), the defendants in *United States v. Hardage et al.*, 750 F. Supp. 1460 (W.D. Okl. 1990) including the following companies: Advance Chemical Company, Allied-Signal, Inc.; AT&T Technologies, Inc.; Ashland Oil, Inc.; Atlantic Richfield Company; Borg Warner Corporation; Cato Oil & Grease Company; Dal-Worth Industries, Inc.; Double-Eagle Refining Company; Exxon Corporation; The Firestone Tire & Rubber Company; Foster Feed & Seed Co.; Gencorp, Inc.; Bull HN Information Systems, Inc.; J.O.C. Oil Exploration Company, Inc.; Kerr-McGee Refining Corporation; L&S Bearing Company; Magnet Peripherals, Inc.; Maremont Corporation; McDonnell-Douglas Corporation; Mobil Chemical Corporation; Nalco Chemical Company; Oklahoma Gas and Electric Company; Oklahoma National Stockyards Company; The Oklahoma Publishing Company; Rockwell International Corporation; Texaco, Inc.; Texas Instruments, Inc.; Uniroyal, Inc.; UOP, Inc.; Westinghouse Electric Corporation; Weyerhaeuser Company; Powell Sanitation Service, Inc.; Samuel L. Bishkin, individually, and doing business as Eltex Chemical & Supply Company; United States Pollution Control, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, the Jones-Blair Co. and the O'Brien Corporation, respectfully pray that a writ of certiorari issue to review the judgment of the court of appeals entered in this case on May 5, 1995.

OPINIONS BELOW

Following appeal of an April 2, 1991 settlement order by the Western District of Oklahoma, the United States Court of Appeals for the Tenth Circuit remanded the case for an

evidentiary hearing. 982 F.2d 1491 (10th Cir. 1993). The district court for the Western District of Oklahoma entered its judgment denying Petitioners' Motion for Recusal on March 25, 1993. (Appendix A). On January 10, 1994, the district court issued its final order in this case finding Petitioners, the Jones-Blair Co. and the O'Brien Corp. ("JB/O'Brien") entered into a settlement with the Hardage Steering Committee ("HSC") on March 27, 1991. (Appendix B). On May 5, 1995, the Tenth Circuit denied Petitioners' subsequent appeal (Appendix C), and on June 28, 1995, denied Petitioners' Request for Rehearing. (Appendix D). The decisions following remand are unreported but are contained in the Appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Tenth Circuit denied Petitioners' appeal of the decisions of the district court on May 5, 1995. Petitioners filed a timely request for rehearing, which was denied by the Tenth Circuit on June 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The textual portions of Oklahoma Statutes, Title 15 (Contracts), §§ 1, 2, 51, 53, 63, 66, 67, 71-73, 233 and 235 relevant to the determination of this appeal are set forth in Appendix E. The appropriate textual portions of 28 U.S.C. § 455 relevant to this Court's review are set forth below:

> § 455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

STATEMENT OF THE CASE

JB/O'Brien were in the district court defending against the HSC's cost recovery claim under § 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607. Thus, the district court had jurisdiction under 42 U.S.C. § 9613. Although JB/O'Brien had each already paid hundreds of thousands of dollars to the United States in a *de minimis* settlement of their alleged CERCLA liability, in September 1989 the district court ruled that the contribution protection of 42 U.S.C. § 9622(g)(5) did not extinguish HSC's claim against JB/O'Brien under CERCLA. By March 27, 1991, only JB/O'Brien and one other defendant, Cook Paint, all represented by the same counsel, Mr. Schulcz of The Harker Firm, remained in the case.

The transcript of the March 27, 1991, hearing in the district court judge's chambers at Appendix F paints the picture of judicial bias, one of the two overriding issues in the case. Mr. Conger, liaison counsel, cited a letter at Appendix G written to him six days before by Mr. Harker, JB/O'Brien's counsel, and said a settlement on their behalf should go forward. (App. F, 32a-34a). JB/O'Brien's own counsel of record, Mr. Schulcz, then denied the current validity of the letter and represented to the district court that his clients had not authorized and did not authorize settlement and that liaison counsel had previously been informed that the letter's terms had been revoked. (App. F, 34a-35a). Judge Lee West then said:

> The Court will enforce the settlement. . . . *The Court is not about to undertake a trial* of this magnitude and size on behalf of two *de minimis* parties. Costs would very quickly exceed any amount in controversy as between them and certainly exceed any differences in

> their position now from the time that that was stated. For those reasons the Court will enforce the settlement.

(App. F, 35a) (emphasis added).

To JB/O'Brien and any reasonable person, the judge's declaration was clear: "not about to undertake a trial of this magnitude and size on behalf of two *de minimis* parties" means "I'm not about to let you *de minimis* parties have your day in court under any circumstances."

JB/O'Brien appealed the district court's order. The Tenth Circuit vacated the order and remanded the case to the district court for an evidentiary hearing concerning whether a settlement was reached. JB/O'Brien then moved for Judge Lee West's recusal under 28 U.S.C. § 455, based on his on-the-record statement that he was not about to give JB/O'Brien (the two *de minimis* parties) their day in court and his previous refusal to rule on several dispositive motions that had been filed months before the March 1991 trial date. The judge denied JB/O'Brien's recusal motion.

After deposing the witnesses, JB/O'Brien moved for summary judgment. Judge West denied the motion without explaining what material facts were still in dispute. (App. H). A hearing was held in December 1993.

The second overriding issue arose because of the district court's failure to apply Oklahoma's law of contracts. Under the provisions of Title 15 of Oklahoma Statutes ("15 O.S.") HSC was required to show that the adverse parties intended and agreed to settle, *i.e.*, there was a meeting of the minds (15 O.S. §§ 2, 51, 66), and that JB/O'Brien communicated acceptance to someone in the HSC authorized to act on its behalf. (15 O.S. §§ 51.3, 67). Yet the

record shows that this was not the case. Rather, the following evidence was before the district court.

Liaison counsel, Mr. Conger, admitted that he neither settled on behalf of JB/O'Brien nor communicated to HSC any acceptance of its offer. (App. I, 52a-53a). HSC admitted to the district court that Mr. Conger did not settle (App. I, 46a), but argued, without evidence, that Mr. Condren, a lawyer who did not represent JB/O'Brien, settled on JB/O'Brien's behalf. (App. I, 46a).

Mr. Conger's failure to communicate acceptance was not a mere oversight. Under the laws of agency and Rules of Professional Responsibility, Mr. Conger could not openly act against his *de minimis* clients' interests. Mr. Conger already knew that the settlement instructions for JB/O'Brien he had received in a letter six days earlier were outdated and had been changed when (1) he heard Mr. Schulcz, JB/O'Brien's counsel, argue with Mr. Condren, a co-counsel for Cook Paint (App. I, 60a), and Mr. Condren informed Mr. Conger that Mr. Schulcz had said JB/O'Brien would not settle even if Cook Paint settled (App. I, 60a); and (2) in an off-the-record conference in Judge West's chambers, he again heard Mr. Schulcz say JB/O'Brien had not authorized settlement. (App. B, 9a - Finding No. 21). This all transpired before the HSC ever knew about Mr. Harker's letter written to Mr. Conger six days earlier or its terms addressing a possible settlement scenario that Mr. Schulcz now repudiated. (App. J, 68a-70a, App. K, 75a-77a).

Given the requirement under Oklahoma contract law, that acceptance of a settlement offer be communicated to the offeror by the offeree, HSC's admission (App. I, 46a) that it had received no settlement acceptance from anyone who had authority to act for JB/O'Brien should have resolved the issue. It dovetailed with Mr. Conger's admission that he did not settle on JB/O'Brien's

behalf. Nonetheless, the district court found JB/O'Brien had settled with HSC without ever mentioning Oklahoma law. How then, over the in-court representations of trial counsel on the day of trial that his clients did not agree to settle, did a settlement arise if no one ever communicated acceptance of an offer? Either a biased district court was once again improperly depriving two *de minimis* parties of their day in court or the district court had unlawfully created a new federal settlement rule overriding state contract law.

Additionally, JB/O'Brien argued to the district court that under Oklahoma law they had repudiated or rescinded any agreement that might arguably have arisen. (App. I, 49a-50a). They made the same argument to the court of appeals since the district court ignored this fundamental right under state law.

Without discussion, both as the refusal to recuse and the validity of the settlement, the Tenth Circuit affirmed the district court's decisions. (App. C, App. D).

REASONS FOR GRANTING THE WRIT

This case addresses fundamental rights of federal litigants and the proper role of judges in the exercise of those rights. It is not the typical settlement dispute arising when one party decides to change its mind after both parties reach an agreement following a period of negotiations. In this case HSC, the opposing party, admitted that there were no negotiations (App. J, 68a) and it found out that there was a settlement only when it went into the Judge's chambers to hear the judge make a record of the settlement HSC didn't know had been reached. (App. J, 68a-70a, App. K, 75a-77a). Moreover, *none* of the parties here asked Judge West to enforce a settlement. He did so on his own initiative so he would not have to have a trial. Becoming JB/O'Brien's adversary, Judge West made his purpose very clear on

the record: *"The Court is not about to undertake a trial of this magnitude and size on behalf of two de minimis parties. . . ."* For justification, Judge West improperly overrode JB/O'Brien's own counsel's unmistakable representations that (1) JB/O'Brien did not want to settle and (2) prior settlement instructions to liaison counsel had been revoked in accord with 15 O.S. § 72 (a settlement offer may be revoked any time before it is communicated to the other side).

No case has come before this Court where the presiding judge said he would force a settlement (1) without being asked to do so by one of the parties involved, (2) over the objections of counsel who made it crystal clear that his clients did not want to settle and (3) for the purpose of denying one side its day in court. This is an issue of fundamental fairness, due process and judicial integrity.

This case involves two other issues fundamental to the orderly and constitutional administration of justice, the right to have state law properly applied by federal courts to determine contract issues and the responsibility of reviewing courts to insure that this is done. In *Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938), this Court reversed a dangerous precedent that had allowed federal courts to fashion their own version of what they thought state law should be. Under the *Erie* Doctrine, federal courts *must* apply state law as it is applied in the state courts; federal judges are "not free to engraft on those state rules exceptions or modifications" incompatible with state law. *Day and Zimmermann Inc. v. Challoner*, 423 U.S. 3, 4 (1975). Yet that is precisely what happened here.

The district court's opinion finding JB/O'Brien entered into a settlement (without the HSC knowing it) makes not a single mention of state law. State law requires affirmative acceptance of an offer by the offeree, for a contract to arise. But the counsel

authorized to enter into the agreement admitted that he did not do so and HSC, the opposing party agreed. Nonetheless, the court found a contract to settle had arisen. Although state law allows an offer to be withdrawn, and liaison counsel was notified that his previous instructions had been changed before HSC ever found out about the offer, the court said the original offer was irrevocable. This is not the application of state law under *Erie* but a return to the anything goes days of *Swift v. Tyson*, 16 Pet.1 (1842).

The court of appeals compounded this error by forgetting this Court's guidance in *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) that, since courts of appeals were better situated to evaluate the nuances of state law and ensure its uniform application and interpretation, they were not to defer to district courts on the application of state law. Although the district court's failure to apply state law was clearly before the court of appeals, its affirmance says not a single word about state law. Given Judge West's statement about not having a trial, one would have thought the court of appeals might have been interested in the appearance of justice enough to list the elements of contract and how they were met. Consequently, the court of appeals breached it obligation to insure state law was applied properly.

I.

THE COURT OF APPEALS HAS NOT FOLLOWED THIS COURT'S GUIDANCE THAT "JUSTICE MUST SATISFY THE APPEARANCE OF JUSTICE."

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). An impartial judge is a necessary factor in insuring "an impartial and disinterested tribunal," since "[f]airness of course requires an

actual absence of bias in the trial of cases." *In re Murchison*, 349 U.S. 133, 136 (1954).

As a corollary to this fundamental right, 28 U.S.C. § 455(a) requires that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The standard is an objective one, "so that what matters is not the reality of bias or prejudice but its appearance. Quite simply and quite universally, recusal [is] required whenever impartiality might reasonably be questioned." *Litkey v. United States*, 114 S. Ct. 1147, 1154 (1994).

The threshold question is what appearance did Judge West cause when he refused to accept JB/O'Brien counsel's (Mr. Schulcz) representations on the day of trial that his clients did not authorize settlement and stated, instead, that the court was "not about to undertake a trial . . . on behalf of two *de minimis* parties." On its face the statement suggests that due process is dependent on the dollar amount at stake, that if the dollar amount of the claims were more substantial JB/O'Brien would be entitled to their day in court. Clearly, the statement indicates a judicial viewpoint that a party's opportunity for a trial is a privilege not a right, dependent on the judge's evaluation of the trial's value. When the Tenth Circuit remanded to Judge West the question of whether JB/O'Brien agreed to a settlement, is it reasonable to expect the very judge who had allowed their dispositive motions to languish, enforced a settlement which neither party requested and who said he was not about to hold a trial for JB/O'Brien's claims under any circumstances, to suddenly become a paragon of impartiality? A review of all the circumstances in the case would indicate otherwise.

Third party defendants JB/O'Brien, had already paid the United States hundreds of thousands of dollars to settle their alleged liability under a CERCLA § 122(g), 42 U.S.C. § 9622(g),

de minimis settlement. Yet, despite the contribution protection provisions of CERCLA §§ 122(g)(5) and 113(f)(2), the HSC was allowed in an erroneous ruling of the district court to continue its litigation against JB/O'Brien.[1] *See Hardage*, 982 F.2d at 1493.

The question of what response costs HSC was entitled to recover was decided in the remedy phase of the trial in which HSC counter-claimed for response costs against the United States. *See United States v. Hardage*, 750 F. Supp. 1460 (W.D. Okla. 1990). At that phase of the trial, HSC claimed that it was entitled to recover various categories of alleged response costs totalling $9.5 million. The district court rejected the HSC's position, found that response cost categories totalling only $3.716 million were authorized by CERCLA, and that the remaining HSC costs were not recoverable. *Id.* at 1512-1520. Immediately thereafter, JB/O'Brien facing an HSC claim of $34-55 million,[2] filed a motion for summary judgment asking the court (Judge West) to apply the doctrine of collateral estoppel to HSC's response cost claims against them (App. L, 79a). Judge West ignored that motion. It was never ruled on, although it was fully briefed months before the March 1991 trial. *Hardage*, 982 F.2d at 1493 n.4.

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1. On September 22, 1989 the district court held that parties already liable under CERCLA § 107(a) such as HSC could maintain a separate response cost claim against other potentially responsible parties under § 107 and thereby defeat the contribution protection given JB/O'Brien under provisions of § 122(g)(5), 42 U.S.C. § 9622(g)(5). This conclusion of law was later rejected by the Tenth Circuit in *United States v. Colorado and Eastern Ry. Co.*, 50 F.3d 1530 (10th Cir. 1994). Because of Judge West's bias and failure to apply state law, JB/O'Brien never had their day in court to challenge this initial error of the district court.

2. "At the hearing HSC represented to the district court that its claim for response costs amounted to approximately $10 million. Later, HSC claimed it had incurred response costs of $34-55 million." *Hardage*, 982 F.2d at 1492 n.3.

JB/O'Brien also moved the district court (Judge West) to reconsider its September 1989 decision that liable parties could maintain response cost claims despite the contribution protection provisions of 42 U.S.C. § 9622(g)(5). (App. M, 81a). Several courts, including the First Circuit in *United States v. Cannons Engnr. Corp.*, 899 F.2d 79 (1st Cir. 1990), had in the meantime, ruled that such a decision eviscerated Congress' objectives of promoting settlement and finality. In the same motion, JB/O'Brien also requested dismissal of HSC's claim based on HSC's misrepresentation to the district court that HSC's § 107 response cost claims were only $9.5 million, and then, increasing HSC's claims to $34-55 million immediately after the court decided that this § 107 claim defeated the statutory contribution protection accorded JB/O'Brien. This motion also languished in Judge West's black hole.

Is it reasonable for JB/O'Brien to conclude that Judge West was impartial when he (a) refused to rule on their long-pending dispositive motions that could have eliminated the need for trial; (b) decided to force a settlement without the request of any party to that alleged settlement; (c) disregarded JB/O'Brien's in-court representations that they did not agree to settle and wanted to go to trial; (d) stated, before ruling, that he was not about to let two *de minimis* parties have their day in court? The answer should be obvious.

Without explanation the Tenth Circuit approved Judge West's denial of JB/O'Brien's recusal motion as well as his finding that a settlement arose. The Tenth Circuit forgot that "[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and non-partisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1988). The bold statement by the judge that he was not about to let two parties have their day in court should have been a clear indicator that the judge's reasoning may well not be in accord with the law and connote, instead, an

unfavorable disposition that is somehow "wrongful or inappropriate." *Litkey,* 114 U.S. at 1155. It should have prompted a close examination of the judge's decision to see that his application of law to the facts was in strict accord with state law. Unfortunately the court of appeals failed in this function. Like the district court, the appeals court's decision is devoid of any mention, discussion or application of even the elements of a contract under Oklahoma law.

A recent review of a judge's on-the-record comments that indicated the possibility of bias is *United States v. Antar,* 53 F.3d 568 (3rd Cir. 1995). In the midst of a long colloquy at sentencing, the judge said, "My object in this case has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others." *Id.* at 573. In characterizing this statement the Third Circuit said, "this is a case where the district judge, in stark, plain and unambiguous language, told the parties that his goal in the criminal case, from the beginning, was something other than what it should have been and indeed, was improper." *Id.* 576.

When recusal is the issue, "our focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter." *Id.* at 576 (citation omitted). Taking the "clearest and most obvious reading of the language", *id.* at 577, the court traced the impact of the judge's comments through his various rulings and concluded that it was "constrained to say that a reasonable person could think the judge's goal during the criminal proceeding — and the reason behind some of his rulings — was to enforce orders issued in a parallel civil case." *Id.* at 579. Consequently, recusal was necessary because the judge's comment gave the appearance of affecting the fairness and integrity of the trial, "seriously affect[ing] the . . . public reputation of the judicial proceeding." *Id.* (quoting *United States v. Olano,* __ U.S. __, 113 S. Ct. 1770, 1779 (1993)).

This case is similar to *Antar* in that the judge's "stark, plain and unambiguous language told the parties that his goal" was to preclude JB/O'Brien from having their day in court, a right guaranteed by our Constitution. Furthermore, had the Tenth Circuit analyzed the judge's rulings in light of Oklahoma law it would have seen that the judge's goal was reflected in his initial decision to force a settlement without request by the parties involved, and his legally incorrect subsequent rulings, *e.g.*, a contract arose although no one communicated acceptance. Although Judge West admitted that "Schulcz advised the Court (with Mr. Conger present) that [JB/O'Brien] did not intend to settle with HSC," in the off-the-record hearing (App. B, 9a - Finding No. 21), and this occurred before HSC even knew of the Harker letter, he nonetheless concluded that Mr. Conger was never told JB/O'Brien did not want to settle (App. B, 10a - Conclusion No. 3). Whatever standard the Tenth Circuit used to evaluate the "clearest and most obvious reading of the language" used by Judge West, it did not evaluate what this means to a reasonable man.

While it is natural for appellate judges to defend those who bear the daily brunt of making judicial decisions, it is not appropriate for them to fail to give proper and serious attention to claims of bias or prejudice. In an era when many question the ability of the judicial system to provide justice, this case provides the Court an opportunity to reinforce the responsibility of United States courts of appeal to ensure that those who find themselves in court, as many innocent parties do in CERCLA litigation, are accorded their basic rights, maintaining the public trust and confidence in the impartiality of the federal judiciary; "to perform its high function in the best way, 'justice must satisfy the appearance of justice.' " *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14).[3]

3. *See also* W. Blackstone *Commentaries*, Book III, *361 ("And should

(Cont'd)

II.

THE CIRCUIT COURT'S DECISION IMPROPERLY VALIDATES THE DISTRICT COURT'S ESTABLISHMENT OF A NEW FEDERAL SETTLEMENT RULE CONTRARY TO EXISTING OKLAHOMA LAW AND THIS COURT'S PRECEDENT.

The fundamental concept of the freedom to contract is deeply embedded in our nation's framework. "[I]t is clear on due process grounds, no judge can compel a settlement prior to trial on terms which one or both parties finds unacceptable." *In re LaMare,* 494 F.2d 753, 756 (6th Cir. 1974). Yet, the court of appeal's affirmance of the district court's decision herein establishes some new, undefined federal common law settlement criteria for CERCLA cases, *see* 42 U.S.C. § 9601 *et seq.*, that is at odds with basic settlement principles and negates rather than applies Oklahoma contract law, the state in which the case arose.

In *Day and Zimmermann Inc. v. Challoner,* 423 U.S. 3, 4, (1975), this Court said that a federal court is "not free to engraft on those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sets." *See also City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 313, 101 S.Ct. 1784, 1790 (1981) (federal common law is appropriate in only "a few and restricted instances"). The law of contracts governing settlements of private party litigation is an area where state law should govern. If the alleged settlement at issue here is governed by Oklahoma law, rather than judge-made federal law, the statutory elements of a contract under Oklahoma

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(Cont'd)
the fact at anytime [show a biased judge], there is no doubt that such misbehavior would draw down a heavy censure from those to whom the judge is accountable for his conduct.").

law would be evident in the record and in the written opinion of the lower courts. As shown below they are not.

Moreover, the court of appeals forgot the Court's guidance in *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991), that courts of appeals were better suited than district courts to provide the searching analysis of state law required under our concepts of federalism and to ensure consistent interpretation and application of controlling state law. That mission was not performed in this case. The court of appeals mirrored the district court in failing to consider the essential elements of a contract under Oklahoma law and show how they had been met. Neither court below gave even a cursory discussion of Oklahoma contract law. The failure of the court of appeals to follow this Court's direction of energetic review has led to the imposition of federal rule the sole purpose of which is expediency or docket control, resulting in a denial of due process and justice.

Under Oklahoma law, as shown below, settlements are to be entered and determined with precision and settlement instructions to counsel may be changed before an offer of settlement is accepted; under the district court's decision, settlements merely happen despite the expressed opposition of one of the parties.

A. For A Binding Settlement To Arise Under Oklahoma Law JB/O'Brien Had To Communicate Acceptance Of HSC's Settlement Offer To An Agent Of The HSC Authorized To Receive JB/O'Brien's Acceptance.

In Oklahoma, a valid settlement must conform to contract law. *Coates v. First Nat'l Bank and Trust Co. of Okla. City*, 176 Okla. 322, 55 P.2d 441, 445 (1936); *Maddox v. Northern Natural Gas Co.*, 259 F. Supp. 781 (W.D. Okla. 1966) (applying Oklahoma law to dispute whether settlement arose). The party

alleging the existence of an agreement, in this case HSC, must prove the existence of the essential statutory elements of a contract. *United States et al. v. Buckner & Moore*, 505 F. Supp. 409, 412 (W.D. Okl. 1979). This includes mutual consent (15 O.S. § 2.2),[4] and that the alleged "consent of the parties to a contract [was]: 1. Free; 2. Mutual; and 3. *Communicated by each to the other.*" (15 O.S. § 51) (emphasis added). The district court failed to find as a matter of law or fact that on March 27, 1991, JB/O'Brien had consented to the HSC's offer and had communicated consent to the HSC. As a matter of law, he could not make such findings because there was no evidence to support it.

"To constitute a contract there must be an offer by one party and acceptance by the other." *Maddox*, 259 F.Supp. at 783. For a valid settlement to occur, consent to a settlement *must be* "communicated by each to the other." 15 O.S. § 51.3. As the Oklahoma Supreme Court explained in *Armstrong v. Guy H. James Constr. Co.*, 402 P.2d 275, 277 (1965) (emphasis in original):

> An offer becomes a binding promise and results in a [settlement] only when it is accepted, 17 Am. Jur. 2d. Contracts, sec. 41; *Strohm v. Board of Trustees*, 203 Okl. 635, 225 P.2d 159. Ordinarily, to constitute acceptance of an offer, there must be an expression of the intention by word, sign, writing or act, *communicated or delivered to the person making the offer or his agent.* 17 Am. Jur. 2d. Contracts § 414. One of the essentials of the existence of a contract is the consent of the parties capable of contracting, 15 O.S. 1961, § 2, and the consent must be

4. The cited statutes are reproduced at Appendix E.

communicated by each to the other, 15 O.S. 1961, § 51.

In *Armstrong*, the central issue was where was the employment contract consummated since that determined which state's laws applied. The Oklahoma Supreme Court looked to where the parties "*communicated* the fact of their acceptance" of an employment offer, *id.* at 278-79 (emphasis added), to determine where "assent was given." *Id.* at 277. *See also 1414 Partnership v. Taveau*, 815 P.2d 1228, 1229 (Okla. App. 1991) ("To constitute acceptance of an offer, there must be an expression of the intention . . . communicated or delivered to the person making the offer or his agent"). Consequently, there can be no agreement where, as shown below, there is no communication of acceptance to the offeror by an authorized representative of the party accepting the offer.

Additionally, 15 O.S. § 67 specifies that "consent can be communicated with effect, *only by some act . . . of the party contracting*, by which *he intends* to communicate it. . . ." (emphasis added). The requirements of §§ 51 and 67 thus define acceptance of an offer as an affirmative act of communication by the accepting party. A settlement cannot occur without the acceptor's active participation in the acceptance process. The HSC had the burden to establish that any acceptance was communicated by an authorized agent of JB/O'Brien to the HSC, *see Buckner & Moore*, 505 F. Supp. at 412, a burden it failed to meet.

B. The Evidence Shows No Authorized Party Accepted HSC's Settlement Offer On Behalf Of JB/O'Brien.

The district court's finding that Mr. Conger was authorized to act on JB/O'Brien's behalf during the "Phase III litigation," (App. B, 9a - Conclusion No. 1) is similar to its original decision,

"that Mr. Conger is authorized to settle the case. . . ." (App. F, 35a). Yet Mr. Conger's clear testimony at the December 21, 1993 hearing was that *he did not settle or act on behalf of O'Brien on March 27, 1991.* (App. I, 52a-53a). The HSC agreed with Mr. Conger. In its opening statement at the December 21, 1991 hearing, the HSC said, "*Mr. Conger did not enter into any agreement on behalf of Jones-Blair and O'Brien.* This is not about an agreement that Mr. Conger did or did not enter into. Therefore, whatever Mr. Schulcz may have said to Mr. Conger on that day is irrelevant." (App. I, 46a) (emphasis added).

Having agreed that Mr. Conger did not communicate any alleged acceptance, the HSC had to prove that on March 27, 1991 JB/O'Brien accepted HSC's offer and intended to act through some other agent who affirmatively communicated the alleged acceptance to the HSC. Although HSC tried to make Mr. Condren, co-counsel for Cook Paint, JB/O'Brien's agent (App. I, 46a) the district court found only Mr. Conger was authorized. (App. B, 4a - Conclusion No. 1). Thus, JB/O'Brien's only *authorized* agents were Mr. Conger[5] and The Harker Firm, neither of whom even arguably communicated any acceptance to the HSC. Consequently, no settlement could have arisen.

Although the district court found Mr. Conger had authority to settle for JB/O'Brien, the district court failed to find that, in fact, he exercised that authority and, if so, specify when. HSC agreed he did not. (App. I, 46a). Who then communicated acceptance? Since acceptance of settlement does not occur by accident or inference in Oklahoma, the district court's finding that a settlement arose on March 27, 1991 is contrary to Oklahoma law. Either the district court is plain wrong under

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5. Under the rules of agency, Mr. Conger was precluded from acting against JB/O'Brien's interests once he learned Mr. Schulcz was stating JB/O'Brien did not intend to settle. *See* Restatement (2d) Agency §§ 14, 34, 108(1), 112, 124, 134, 383.

Oklahoma law and the Tenth Circuit failed to apply the appropriate standard, or the district court and Tenth Circuit were both applying a new federal law.

C. The Courts Below Ignored JB/O'Brien's Right To Revoke Or Rescind Under Oklahoma Law.

Additionally, without explanation, the court of appeals' decision denies JB/O'Brien a statutory and equitable right provided by Oklahoma law and recognized by prior Tenth Circuit decisions, the right to revoke or rescind an agreement. *Telex Corp. v. AiResearch Aviation Co.*, 460 F.2d 215, 218 (10th Cir. 1972) ("Oklahoma law allows for rescission of the contract by one of the parties to the contract."); *Harmon v. Diversified Mutual Ins. Co.*, 524 F.2d 361, 365 (10th Cir. 1975) (Oklahoma law "provides that a party to a contract may rescind when his consent was given by mistake."). JB/O'Brien had argued to the courts below that, even if a settlement had been inadvertently reached between JB/O'Brien and the Hardage Steering Committee ("HSC"), JB/O'Brien had promptly rescinded or revoked that agreement, a right firmly established in Oklahoma law by statute, 15 O.S. § 233, and in equity. *See Watkins v. Grady County Soil and Waste Con. Dist.*, 438 P.2d 491, 495 (Okla. 1968). Neither of the courts below addressed that issue, which is wholly separate and apart from the question of whether a settlement had been reached. A fundamental contract right should not be abrogated or denied without some explanation.

III.

THE DISTRICT COURT'S FINDING THAT "ONCE COOK PAINT SETTLED WITH HSC, SETTLEMENTS BETWEEN HSC AND JONES-BLAIR AND O'BRIEN WERE EFFECTED" IS CONTRARY TO OKLAHOMA LAW AND REPRESENTS A SERIOUS BREACH OF FEDERALISM SINCE IT ESTABLISHES A NEW FEDERAL SETTLEMENT RULE WITHOUT JUSTIFICATION.

The district court's Conclusion of Law No. 3 (App. B, 10a) that "the letter of March 22, 1991, authorized the settlements that the court enforced" could be correct only if: (1) Mr. Schulcz had not been in the district court to represent JB/O'Brien; (2) the district court had not been on notice from Mr. Schulcz that his clients did not want to settle;[6] and (3) liaison counsel, Mr. Conger, as authorized agent for JB/O'Brien, had communicated acceptance of HSC's settlement offer to HSC. However, that is not the evidence and the courts below made no such findings. Had the court of appeals applied Oklahoma law it would have seen the district court's conclusion was wrong.

Given liaison counsel Mr. Conger's testimony that he did not settle, the district court's finding, that "once Cook Paint settled with HSC, settlement with Jones-Blair and O'Brien were affected," (App. B, 10a - Conclusion No. 3) could be correct under Oklahoma law, only if counsel's letter of instruction calling for action by Mr. Conger was a self-executing, irrevocable contract. However, under Oklahoma law, the only way the instructions in the Friday letter could be self-executing was if JB/O'Brien had already entered into an agreement with the HSC with

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6. When "Mr. Schulcz told the Court [his clients] did not intend to settle," (App. B, 9a - Finding No. 21), the HSC had no knowledge of the letter Judge West later relied on to force a settlement. *See* note 7, *infra*.

a condition precedent. "A condition precedent of a contract is one calling for the performance of some act or happening of some event *after* the contract is entered into, upon which its obligations are made to depend." *Matter of Estate of Dillon*, 575 P.2d 127, 130 (Okla. App. 1977) (citation omitted) (emphasis added). In other words, under state law JB/O'Brien would be obligated to settle with the HSC when Cook Paint settled only if HSC and JB/O'Brien had previously entered into an agreement to settle that specifically spelled out that exact scenario so that when Cook Paint settled, *i.e.*, the condition precedent occurred, the agreement would ripen into a binding settlement with the HSC. Yet there is absolutely no evidence of any such agreement between JB/O'Brien and the HSC, who knew nothing of the letter or its terms.[7]

In effect, the district court equated "are prepared to settle" with "will settle regardless of what happens." JB/O'Brien had a right under 15 O.S. § 71 to instruct Mr. Conger not to communicate acceptance of the HSC's offer any time before he actually communicated their acceptance, a right the records shows they exercised through Mr. Schulcz.

The district court's decision also directly conflicts with other provisions of Oklahoma law. Under Oklahoma law, settlements are entered willingly or not at all. *See* 15 O.S. § 51. The testimony of both Jones-Blair and O'Brien at the hearing is that they did not wish to enter into a settlement agreement with HSC. (App. I, 63a (Paul Dague - Jones-Blair); App. N, 83a (Patricia Houle -

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7. HSC's agents for settlement with *de minimis* parties such as JB/O'Brien, Mr. Roark and Mr. Tomlinson (App. B, 5a - Fact No. 9; App. J, 66a; App. K, 75a) testified that HSC knew nothing of Mr. Harker's letter of instruction to Mr. Conger until just before the on-the-record hearing announcing the enforcement of the settlement, (App. J, 68a-71a; App. K, 74a-77a). Mr. Roark also testified that prior to the 3/27/91 hearing, Mr. Conger told HSC "that [JB/O'Brien] had not . . . accepted [HSC's] offer. . ." (App. J, 68a).

O'Brien)). The record is also clear that Mr. Conger knew that JB/O'Brien did not want to settle and that the terms of the letter had changed. He knew this before the district court was aware of the letter, before any alleged acceptance of the HSC's settlement terms on behalf of JB/O'Brien, (App. I, 59a-60a), and before the existence of the letter had been communicated to HSC. *See* note 7, *supra.* Consequently, had Oklahoma law been considered, the court would have found that the terms in the letter were revoked and it no longer had any authority since "[a] proposal may be revoked at *any* time before its acceptance is communicated to the proposer but not afterwards." 15 O.S. § 72.

The district court also knew JB/O'Brien did not want to settle. (App. B, 9a - Facts No. 20, 21). But because Mr. Conger could not, contrary to his clients' wishes, communicate acceptance without committing malpractice, the district court decision could only be based on a new federal common law rule that in effect says, once a party has indicated it *may* settle, it may not change its mind but will be forced to settle without the request of the opposing party so that the district court does not have to bother with a trial.

Further, had Oklahoma law been considered, the district court would not have found that the 3/22/91 letter (App. G, 38a) constituted an "offer of settlement" to the HSC (App. B, 10a - Conclusion No. 3). First it was not addressed to HSC but to Mr. Conger. Second, all testimony by those persons who authorized the letter and that of its author is that it was intended only to cover a weekend contingency, in the unlikely event that Cook might settle with its insurance carrier over the weekend before trial on Monday morning, by instructing Mr. Conger that if that contingency occurred, *i.e.*, if Cook settled with its insurance carrier over the weekend before trial, Mr. Conger was to then fulfill 15 O.S. §§ 2 and 51 by communicating acceptance of an offer to the offeror. This never occurred and the courts below made none of these requisite findings under state law.

Finally, the district court's failure to apply state law, applying instead an extemporaneously crafted federal rule, is an impermissible attack on the status and role of counsel before the court. The letter did not limit or abrogate Mr. Schulcz's authority to speak for JB/O'Brien or his right to direct Mr. Conger's efforts on their behalf. Although Mr. Schulcz correctly expressed the desires of his client, the district court dismissed them and, without checking further, relied on a letter then six days old, whose authority and substance were both clearly challenged and revoked by Mr. Schulcz.

The right of a person to be represented by counsel of one's own choosing is a fundamental part of American jurisprudence. It is an empty right if a judge can disregard counsel's representation as to his client's desire to exercise their constitutional right to trial.

CONCLUSION

After forcing a settlement over the objections in court by counsel for two *de minimis* parties that they had not authorized a settlement, a statement by a district court judge that he "was not about to undertake a trial . . . on behalf of two *de minimis* parties" should be a *prima facie* indicator to a court of appeals of an inappropriate judicial predisposition such that recusal was required under 28 U.S.C. § 455(a).

Oklahoma contract law requires a meeting of the minds and a specific communication of acceptance by the offeree of settlement terms to an authorized agent of the offeror. It also allows revocation of settlement instructions prior to the communication of acceptance of a settlement offer. Nonetheless, without any discussion or consideration of state law, the district court, and the Tenth Circuit found a settlement arose despite the objections of JB/O'Brien's counsel and the lack of any proof of

communication of acceptance of HSC's settlement offer by JB/O'Brien. This is not Oklahoma law but a new impermissible *federal* rule. Nothing in the district court's decision or the panel's affirmance addresses why, contrary to this Court's guidance, a new federal common law needs to be derived in a simple contract dispute, even under CERCLA.

For the above reasons, the Court should review this unprecedented denial of a federal litigant's rights to a fair and impartial trial. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DENYING MOTION FOR RECUSAL

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-1401-W

Oklahoma City, Oklahoma

Dated: March 25, 1993

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, ET AL.,

Defendants.

TO: ROBERT D. DENNIS, CLERK

Please enter the following minute order in the above-entitled case.

This matter comes before the Court on the Motion for Recusal filed pursuant to title 28, section 455(a) of the United States Code by The O'Brien Corporation and Jones-Blair Company. The movants have contended that this Court's actions and inactions cast doubt on its impartiality towards them. The Hardage Steering committee has responded in opposition to the motion.

The parties have agreed that the test under section 455(a) "is

whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987) (citations omitted). Upon applying that test to the facts and circumstances in this case and after reviewing the case law cited by the parties, the court, in its discretion, finds that the movants have failed to show that recusal is warranted. Accordingly, the Motion for Recusal filed on February 25, 1993, should be and is hereby DENIED.

The parties are DIRECTED to confer within fifteen (15) days in a good faith effort to agree upon the method to be employed by the Court in resolving the remaining issues and to submit their suggestions to the Court within five (5) days thereafter.

Counsel Notified _____

Clerk to Notify ___X___

s/ Lee R. West
LEE R. WEST
UNITED STATES
DISTRICT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA FINDING A SETTLEMENT AROSE ON MARCH 27, 1991

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED JANUARY 10, 1994

No. CIV-86-1401-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE et al.,

Defendants.

ORDER

On March 27, 1991 (and thereafter, in writing on April 2, 1991), this court enforced settlements between third-party defendants Jones-Blair Company (Jones-Blair) and The O'Brien Corporation (O'Brien) and the Hardage Steering Committee (HSC). Jones-Blair and O'Brien appealed the court's Order to the United States Court of Appeals for the Tenth Circuit. The appellate court, after deciding that a material issue of fact existed as to whether settlements with the two third-party defendants had indeed been reached, remanded the matter for hearing.

An evidentiary hearing was held on December 31, 1993, during which all parties and participants had an opportunity to be heard and cross-examine witnesses. Based upon that hearing, the court opines that the settlements between Jones-Blair and O'Brien and HSC should be enforced.

Appendix B

Findings of Fact

1. In 1986, the United States of America filed this action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675, against certain generators and transporters of hazardous substances that were treated, stored and/or disposed of at the Royal N. Hardage waste disposal site near Criner, Oklahoma. The government sought both injunctive relief under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), requiring the defendants to clean up the Hardage site, and recovery under Section 107(a) of CERCLA, *id.* § 9607(a), of certain costs incurred by the government.

2. Most of these generators and transporters formed HSC and stipulated to liability for the presence of hazardous substances at the Hardage site.

3. Jones-Blair and O'Brien are paint manufacturers and generated 43,022 gallons and 26,400 gallons of hazardous substances, respectively, that were received at the Hardage site. Although identified by the Environmental Protection Agency as potentially responsible parties, Jones-Blair and O'Brien were not sued by the government. They were instead named by HSC as third-party defendants along with various others, including Cook Paint and Varnish Company (Cook Paint).

4. Jones-Blair and O'Brien qualified as de minimis parties under Section 122(g) of CERCLA, *id.* § 9622(g), and together with 177 other de minimis parties, entered into a consent decree with the government.

5. On April 7, 1989, the government submitted the consent

decree to the then-assigned district judge for approval. In approving the settlement, the district judge on September 22, 1989, distinguished contribution claims from response cost claims under CERCLA and ruled that the consent decree did not release the de minimis parties from potential liability for HSC's response costs.

6. At all times relevant to this matter, Timothy L. Harker and Arthur A. Schulcz, Sr., with the law firm, The Harker firm, in Washington, D.C., were attorneys for Jones-Blair, O'Brien and Cook Paint.

7. Chris Condren with the law firm, Pierce Couch Hendrickson Johnston & Baysinger, in Oklahoma City, was also counsel for Cook Paint.

8. J. William Conger, with the law firm, Hartzog Conger Cason & Hargis, in Oklahoma City, had been appointed by the court to act as liaison counsel for the third-party defendants during Phase III of the litigation and as such, was also counsel for Jones-Blair, O'Brien and Cook Paint.

9. Robert D. Tomlinson and Robert L. Roark with the law firm, McKinney, Stringer & Webster, P.C., in Oklahoma City, Oklahoma, among others, were counsel for HSC during this phase of the lawsuit.

10. On November 28,1990, the court found Jones-Blair and O'Brien, as generators of hazardous substances received at the Hardage site, liable under Section 107(a) of CERCLA for their allocated shares of response costs incurred and to be incurred by HSC.

Appendix B

11. The trial on HSC's response cost claims against all third-party defendants was scheduled to commence on Monday, March 25, 1991.

12. On the preceding Friday, March 22, 1991, Harker sent a letter by facsimile transmission to Conger. The letter read:

> "Just to confirm my conversation with you earlier this afternoon, Reliance Universal (now Akzo Coatings, Inc.) is prepared to settle the HSC claim for the $1.00 per gallon offer. The O'Brien Corporation and Jones-Blair are prepared to settle the HSC claims on the same basis of $1.00 per gallon if Cook Paint does *not* litigate the 'HSC response cost' phase. Cook Paint will settle or not based on the willingness of its insurance carrier to assume a portion of the settlement cost acceptable to Cook Paint or on the basis of some alternative arrangement acceptable to Cook Paint and its insurance carrier. Cook's corporate counsel, the firm of Blackwell, Sanders, is in Oklahoma City, today, to advise them on that decision.
>
> "You indicated you would apprise the HSC of the Akzo acceptance and also of the positions of the other companies (Cook, Jones-Blair and O'Brien) in time for settlement to occur and to avoid trial for Akzo and, as appropriate, for the other three companies."[1]

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1. Copies of this letter were sent to Paul Degue for Jones-Blair, Paul Brooks for Akzo Coatings, Inc., Patti Houle for O'Brien and Pat Curran for Cook Paint.

Appendix B

13. On Monday, after being advised of the continuance, Harker drafted letters for use by Jones-Blair and O'Brien. These letters dated March 25, 1991, were sent to these third-party defendants' liability insurance carriers and each letter read in part:

> "This letter serves as further notification to your company of a recent suit and settlement offer involving . . . [Jones-Blair or O'Brien] and the Hardage Criner Superfund Site . . . The HSC has offered Jones-Blair [or O'Brien] a chance to settle for $1.00 per gallon of material allegedly sent to the site. . . . Jones-Blair [or O'Brien] must either settle or litigate the case, with the trial date now set for Wednesday, March 27. . . . Your failure to tender our defense means that we cannot go forward to defend ourselves at trial because we cannot, acting essentially alone, afford the cost of Third party defendants' Liaison Counsel . . . You must tender a defense by 1:00 p.m., March 25, 1991, in which case we will immediately notify Third Party Liaison Counsel to try the case on our behalf. If you wish not to settle you must also notify us by that time. Your continued failure to tender a defense or to assume liability means we will be forced to settle by tomorrow afternoon. . . ."

14. Also, that same day, Harker, in Washington, D.C., conversed by telephone with Schulcz in Oklahoma City. Harker testified that during one afternoon conversation, he instructed

Schulcz to inform Conger that Jones-Blair and O'Brien had decided to proceed to trial regardless of whether Cook Paint settled with HSC.

15. Schulcz testified that he advised Conger of this change in position and then advised Harker of his conversation with Conger.[2] There is no written confirmation of any of these conversations, despite the fact that this course of action was in direct conflict with Jones-Blair's and O'Brien's respective decisions to settle as outlined in Harker's letter of March 22, 1991.

16. Conger testified that although he and Schulcz discussed to various matters on March 25, 1991, no conversation occurred regarding Jones-Blair's and O'Brien's decisions to proceed to trial and both Harker and Conger testified that although Harker and Conger talked by telephone on March 26, 1991, Harker never discussed the change in Jones-Blair's and O'Brien's positions or even commented on the same.

17. Neither Harker nor Schulcz discussed with Condren the letter of March 22, 1991. Condren first became aware of the letter on March 25 or March 26, 1991, and on March 27, 1991, Conger showed him the letter.

18. On March 27, 1991, during pretrial proceedings in chambers, Condren requested that the trial again be delayed for a brief time so that Cook Paint and HSC could continue settlement

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2. At the hearing on March 27,1991, Schulcz stated that Harker "talked to [him] specifically on Monday morning, indicating that he [Harker] would convey the contents of the change to Mr. Conger" and that "[o]n his [Harker's] instruction, he [Schulcz] made sure that we had reserved the right to decide."

negotiations. By that time, HSC had reached settlement agreements or fact stipulations regarding HSC's cost claims with all third-party defendants in the case save Cook Paint, Jones-Blair and O'Brien.

19. The court granted a recess, during which HSC counsel, Condren and Katherine S. Bunn, of the law firm, Blackwell, Sanders, Matheny, Weary & Lombardi, in Kansas City, Missouri, who represented Cook Paint in settlement negotiations with its insurer, attempted to negotiate a settlement.

20. A settlement was reached but it was conditioned upon settlements between HSC and Jones-Blair and O'Brien. Condren and/or Bunn informed Schulcz that Cook Paint had settled with HSC and of the condition placed upon the HSC-Cook Paint settlement. Schulcz objected to any settlement by Jones-Blair or by O'Brien and the Court was informed of the dispute.

21. A hearing was held off-the-record during which (1) Schulcz advised the Court that Jones-Blair and O'Brien did not intend to settle with HSC and (2) Conger informed the Court about the March 22, 1991, letter. The Court announced its intention to enforce the letter and a hearing on-the-record was then held.

Conclusions of Law

1. Conger as court-appointed liaison counsel and more specifically as empowered by Harker's letter of March 22, 1991, had the authority to act on behalf of Jones-Blair and O'Brien during Phase III of the litigation.

2. At the hearing, Jones-Blair and O'Brien failed to prove

that prior to Cook Paint's settlement with HSC not only that they revoked this authority to act on their behalf but also that they communicated to Conger their respective decisions to proceed to trial.

3. Indeed, the evidence presented at the hearing confirms and strengthens the Court's opinion that the letter of March 22, 1991, authorized the settlements that the court enforced. Neither the authority given to Conger nor Jones-Blair's or O'Brien's offer of settlement as outlined in the letter was withdrawn, countermanded or modified by anyone prior to the time the condition in the letter — Cook Paint's settlement with HSC — had occurred. And, once Cook Paint settled with HSC, settlements between HSC and Jones-Blair and O'Brien were effected.

4. Under the terms of these settlements, Jones-Blair, after application of certain credits, owes HSC the principal sum of $24,825.00 and O'Brien owes HSC the principal sum of $43,022.00.

5. Because the court has determined that HSC's settlement offers were accepted by Jones-Blair and O'Brien (once Cook Paint settled) on March 27, 1991, and that Jones-Blair and O'Brien breached these settlement agreements by failure to pay the liquidated settlement amounts, the Court further determines that HSC is entitled to recover prejudgment interest at the rate of six percent (6%) per annum from March 27,1991, to this date. 23 O.S. § 6; 15 O.S. § 266.

6. Finally, because the issues decided herein are dispositive of this matter as to these parties, the Court concludes that there is no just reason to delay entry of judgment. Accordingly, judgment pursuant to Rule 54(b), F.R.Civ.P., shall issue forthwith.

Appendix B

ENTERED this _____day of January, 1994.

s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING APPEAL FILED MAY 5, 1995

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 94-6036
(D.C. No. CIV-86 1401-P)
(W.D. Okla.)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE; ADVANCE CHEMICAL COMPANY; ALLIED-SIGNAL, INC.; AT&T TECHNOLOGIES, INC.; ASHLAND OIL, INC.; ATLANTIC RICHFIELD COMPANY; BORG-WARNER CORPORATION; CATO OIL & GREASE COMPANY; DAL-WORTH INDUSTRIES, INC.; DOUBLE-EAGLE REFINING COMPANY; EXXON CORPORATION; THE FIRESTONE TIRE & RUBBER COMPANY; FOSTER FEED & SEED CO.; GENCORP, INC.; BULL HN INFORMATION SYSTEMS, INC.; J.O.C. OIL EXPLORATION COMPANY, INC.; KERR-McGEE, REFINING CORPORATION; L&S BEARING COMPANY; MAGNETIC PERIPHERALS, INC.; MAREMONT CORPORATION; McDONNELL-DOUGLAS CORPORATION; MOBIL CHEMICAL CORPORATION; NALCO CHEMICAL COMPANY; OKLAHOMA GAS AND ELECTRIC COMPANY; OKLAHOMA NATIONAL STOCKYARDS COMPANY; THE OKLAHOMA PUBLISHING COMPANY; ROCKWELL INTERNATIONAL CORPORATION; TEXACO, INC.; TEXAS

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INSTRUMENTS, INC.; UNIROYAL INC.; UOP, INC.; WESTINGHOUSE ELECTRIC CORPORATION; WEYERHAEUSER COMPANY; POWELL SANITATION SERVICE, INC.; SAMUEL L. BISHKIN, individually, and doing business as Eltex Chemical & Supply Company; UNITED STATES POLLUTION CONTROL, INC.,

Defendants,

HARDAGE STEERING COMMITTEE,

Defendants-Third-Party Plaintiffs-Appellees,

vs.

ABCO, INC.; ACME FENCE & IRON CO.; ADVANCE PACKAGING, INC.; AGNEW AUTO PARTS CO.; AMEDCO STEEL, INC.; AMERICAN TRAILERS, INC.; ANTHES, INC., doing business as Anthes Hi-Reach; ARROW TANK TRUCKS, INC.; ARTHUR G. McKEE & COMPANY; B&J TANK TRUCK SERVICE, INC.; B.W. SOLUTIONS, INC.; BACON TRANSPORT COMPANY, INC.; BEAUTY CRAFT VANITIES; BLACKWELL INDUSTRIAL AUTHORITY; PAUL BOONE, individually, and formerly doing business as Lawton Plating Co.; BROADWAY MACHINE & MOTOR SUPPLY, INC.; THE BUCKET SHOP; C & H SERVICES, INC.; CMI CORPORATION; CENTRAL OKLAHOMA EQUIPMENT CORPORATION; CIMARRON AIRCRAFT CORPORATION; CIMARRON MANUFACTURING COMPANY; CLIFTCO INC.; COOK PAINT & VARNISH COMPANY; CONSOLIDATED CLEANING SERVICE CO; COUNTRY HOME MEAT COMPANY; DAY

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INTERNATIONAL CORPORATION; DEL PAINT CORPORATION, doing business as Del Paint Manufacturing; DIFFEE MOTOR COMPANY; D-MAC LEASING, INC.; DRILLERS ENGINE & SUPPLY, INC.; DURA-CHROME INDUSTRIES, INC.; EUREKA TOOL COMPANY; FERRIS RESOURCES, INC.; FRUEHAUF CORPORATION, Fruehauf Division; FRUEHAUF CORPORATION, doing business as Hobbs Trailer; HOBBS TRAILER; VERNON GARNEY, individually, and doing business as Auto Saver; GLIDDEN COATING & RESINS, Division of SCM Corporation; GROENDYKE TRANSPORT, INC.; HAMM & PHILLIPS SERVICE COMPANY; INDUSTRIAL FABRICATING CO.; JACKIE COOPER OLDS-GMC, INC.; JAMES BUTE COMPANY; MRS. WILLIAM JENKINS, individually, and doing business as Foster Septic Tank Cleaning; J. F. SMITH & SONS, INC.; KELSEY-HAYES CORPORATION, also known as Kelsey Axle & Brakes Co.; LAIDLAW WASTE SYSTEMS, INC.; BILL LANCE, an individual; LARRY GOAD & COMPANY; LASSITER ENTERPRISES, INC.; MASTER MOTOR REBUILDERS, INC.; MATERIALS RECOVERY ENTERPRISES, INC.; McALESTER PUBLIC SCHOOLS; BOB McBROOM, individually, and doing business as American Furniture Stripping; RAY McGEE, individually, and doing business as Quality Drum Service; GEORGE McKIDDIE, individually, and doing business as Capitol Grease Company; GREASE COMPANY; MEDLEY MATERIAL HANDLING, INC.; METROPLEX SANITATION, INC.; MISTLETOE EXPRESS SERVICE; MORRIS FIXTURE COMPANY; NAPKO CORPORATION; NEWMAN BROS. TRUCKING COMPANY; NOBLE CHEMICAL CORPORATION; THE CITY OF NORMAN, OKLAHOMA; NORTHROP WORLDWIDE AIRCRAFT SERVICE, INC.; OKLAHOMA TANK SERVICE; OKLAHOMA TRANSPORTATION

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COMPANY; PAGE INDUSTRIES, INC.; POWELL ELECTRICAL MANUFACTURING COMPANY; GEORGE POWELL, individually, and doing business as Powell Service Company; PREMIER INDUSTRIAL CORP., doing business as Kent Industries; RWR STEEL COMPANY; RABAR ENTERPRISES, INC.; RAM TRANSPORTS, INC.; RELIANCE UNIVERSAL, INC.; S&S PLATING COMPANY; SERMATECH INTERNATIONAL INC.; SOLVENT MANUFACTURING COMPANY, INC.; SOONER OIL PATCH SERVICES, INC.; SPECTOR RED BALL, INC.; STEELCRAFT, INC.; SUBLETT & ASSOCIATES, INC.; SUNWEST INDUSTRIES OF OKLAHOMA, INC.; RAYMOND SWITZER, individually, and doing business as Switzer & Gypsum Lime Company; T.I.P., INC.; THERMO KING SALES & SERVICE OF OKLAHOMA, INC.; TRIANGLE ENGINEERING COMPANY; TRIGG DRILLING COMPANY, INC.; UNITED PLATING WORKS, INC.; VICTOR EQUIPMENT CO.i WASTE SERVICE, INC.; WELCH ENTERPRISES, INC.; JIM WESLEY, individually, and doing business as Jim's Septic Tank; WESTERN COMMERCIAL TRANSPORT, INC.; WESTERN UNIFORM & TOWEL SERVICE, INC.; WESTRAN CORPORATION; WITCO, INC.; XAL CORPORATION; THOMAS ENGEL; A-BETTER SANITATION SERVICE, INC. UNIT PARTS; REAGENT CHEMICAL & RESEARCH, INC.; SUN EXPLORATION & PROD. CO.; CAMERON IRON WORKS; J C. PENNEY CO., INC.; ROHM & HAAS SEEDS, INC.; PHILLIPS PETROLEUM CO.; SOUTH PRAIRIE CONSTRUCTION CO.; THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.; NORDAM CORP.; NATIONAL CAN CORP.; LAND & MARINE RENTAL CO., formerly known as Tesoro Land & Marine Rental Co.; THE GOODYEAR TIRE & RUBBER CO.; CROWL MACHINE & HEAT TREATING CO.;

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CRANE CARRIER CO.; CORNING GLASS WORKS; DELTA FAUCET CO.; OCCIDENTAL CHEMICAL CORP.; JOHN ZINK CO.; GENERAL MOTORS CORP.; DURA-CHROME INDUSTRIES, INC.; THE DOW CHEMICAL CO., also known as Dow Industrial Service of the Dow Chemical Co., Dowell Division of the Dow Chemical Company & Brazos Oil & Gas Division of Dow Chemical Co.; IUTS LIQUIDATING CORP., formerly known as Industrial Uniform & Towell Supply, Inc.; CLYDE'S CARBURETOR SERVICE, INC.; AMOCO PRODUCTION CO., formerly known as Pan American Petroleum; DOVER RESOURCES, INC.; HUDIBURG CHEVROLET, INC.; AMF TUBOSCOPE; CONTAINER CORP. OF AMERICA; EASON OIL CO.; FOX-SMYTHE TRANSPORTATION CO.; INTERNATIONAL CRYSTAL MFG. CO.; KOBE, INC ; NELSON ELECTRIC POWER SERVICES, INC.; NEWSPAPER PRINTING CORP.; RYDER TRUCK RENTAL, INC., formerly known as Wilco Truck Rental, Inc.; SOUTHWEST ELECTRIC CO.; STAR MFG. CO. OF OKLAHOMA; CORKEN INTERNATIONAL CORP., formerly known as Corken Pump Co.; GLOW-LITE CORP. (ARTRA); GENERAL ELECTRIC CO.; FORD MOTOR CO.; CONOCO, INC.; E.I. DUPONT DE NEMOURS & CO.; CONTINENTAL OIL CO.; BLACKWELL ZINC CO., INC. (AMAX); DAY INTERNATIONAL CORP. (Electric Hose & Rubber); CENTRAL SALES PROMOTION, INC.; THE CHARLES MACHINE WORKS, INC.; SOONER FORD TRUCK SALES, INC.; W&W STEEL CO.; CHROMALLOY AMERICAN CORP.; BRITTAIN BROTHERS, INC.; WASTE MANAGEMENT OF OKLAHOMA, INC.; SERMATECH INTERNATIONAL, INC., formerly known as Sermatel, Inc.; ICO, INC., formerly known as Fodco, Inc., Sucker Rod Service &/or Rodcore, Inc.; HOMCO INTERNATIONAL, INC., doing

business as A-1 Bit & Tool; TOM BROWN'S OPTICAL SERVICE, INC.,

Third-Party-Defendants,

and

JONES-BLAIR COMPANY; THE O'BRIEN CORPORATION,

Third-Party-Defendants-Appellants.

ORDER AND JUDGMENT*

Before MOORE, BRIGHT,** and BALDOCK, Circuit Judges.

Defendants Jones-Blair Company and the O'Brien Corporation appeal the district court's order enforcing a settlement agreement following our remand in *United States v. Hardage*, 982 F.2d 1491 (10th Cir. 1993). Additionally, Defendants appeal the district court's denial of its motion for recusal. We exercise jurisdiction pursuant to 28 U.S.C. § 1291.

The parties are familiar with the facts. We review the district court's conclusions of law de novo, *Eastern Investment Corp. v.*

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order filed November 29, 1993. 151 F.R.D. 470.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

United States, 49 F.3d 651, 653 (10th Cir. 1995), and findings of fact for clear error. *Ayala v. United States*, 49 F.3d 607, 613 (10th Cir. 1995). Additionally, we review the district court's denial of a motion to recuse for an abuse of discretion. *Hinman v. Rogers*, 831 F.2d 937, 938 (10th Cir. 1987).

We have reviewed the briefs of the parties and the record on appeal. Based upon our review of the record and the applicable legal principles, we conclude the district court did not commit reversible error by: (1) concluding the parties entered into a settlement agreement, and (2) enforcing that settlement agreement. Additionally, we conclude the district court did not abuse its discretion in denying Defendant's motion to recuse.

AFFIRMED.[1]

Entered for the Court

Bobby R. Baldock
Circuit Judge

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1. Defendant's motion to strike Plaintiff's Fed. R. App. P. 28(j) submission is granted.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING REHEARING DATED JULY 5, 1995

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 94-6036

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROYAL N. HARDAGE; ADVANCE CHEMICAL COMPANY, ALLIED-SIGNAL, INC.; AT&T TECHNOLOGIES, INC.; ASHLAND OIL, INC.; ATLANTIC RICHFIELD COMPANY; BORG-WARNER CORPORATION; CATO OIL & GREASE COMPANY; DAL-WORTH INDUSTRIES, INC.; DOUBLE-EAGLE REFINING COMPANY; EXXON CORPORATION; THE FIRESTONE TIRE & RUBBER COMPANY; FOSTER FEED & SEED CO.; GENCORP, INC.; BULL HN INFORMATION SYSTEMS, INC.; J.O.C. OIL EXPLORATION COMPANY, INC.; KERR-McGEE, REFINING CORPORATION; L&S BEARING COMPANY; MAGNETIC PERIPHERALS, INC.; MAREMONT CORPORATION; McDONNELL-DOUGLAS CORPORATION; MOBIL CHEMICAL CORPORATION; NALCO CHEMICAL COMPANY; OKLAHOMA GAS AND ELECTRIC COMPANY; OKLAHOMA NATIONAL STOCKYARDS COMPANY; THE OKLAHOMA PUBLISHING COMPANY; ROCKWELL INTERNATIONAL CORPORATION; TEXACO, INC.; TEXAS INSTRUMENTS, INC.; UNIROYAL INC.; UOP, INC.; WESTINGHOUSE ELECTRIC CORPORATION;

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WEYERHAEUSER COMPANY; POWELL SANITATION SERVICE, INC.; SAMUEL L. BISHKIN, individually, and doing business as Eltex Chemical & Supply Company; UNITED STATES POLLUTION CONTROL, INC.,

Defendants,

HARDAGE STEERING COMMITTEE,

Defendants-Third-Party Plaintiffs-Appellees,

v.

ABCO, INC.; ACME FENCE & IRON CO.; ADVANCE PACKAGING, INC.; AGNEW AUTO PARTS CO.; AMEDCO STEEL, INC.; AMERICAN TRAILERS, INC.; ANTHES, INC., doing business as Anthes Hi-Reach; ARROW TANK TRUCKS, INC.; ARTHUR G. McKEE & COMPANY; B&J TANK TRUCK SERVICE, INC.; B.W. SOLUTIONS, INC.; BACON TRANSPORT COMPANY, INC.; BEAUTY CRAFT VANITIES; BLACKWELL INDUSTRIAL AUTHORITY; PAUL BOONE, individually, and formerly doing business as Lawton Plating Co.; BROADWAY MACHINE & MOTOR SUPPLY, INC.; THE BUCKET SHOP; C & H SERVICES, INC.; CMI CORPORATION; CENTRAL OKLAHOMA EQUIPMENT CORPORATION; CIMARRON AIRCRAFT CORPORATION; CIMARRON MANUFACTURING COMPANY; CLIFTCO INC.; COOK PAINT & VARNISH COMPANY; CONSOLIDATED CLEANING SERVICE CO; COUNTRY HOME MEAT COMPANY; DAY INTERNATIONAL CORPORATION; DEL PAINT CORPORATION, doing business as Del Paint Manufacturing;

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DIFFEE MOTOR COMPANY; D-MAC LEASING, INC.; DRILLERS ENGINE & SUPPLY, INC.; DURA-CHROME INDUSTRIES, INC.; EUREKA TOOL COMPANY; FERRIS RESOURCES, INC.; FRUEHAUF CORPORATION, Fruehauf Division; FRUEHAUF CORPORATION, doing business as Hobbs Trailer; HOBBS TRAILER; VERNON GARNEY, individually, and doing business as Auto Saver; GLIDDEN COATING & RESINS, Division of SCM Corporation; GROENDYKE TRANSPORT, INC.; HAMM & PHILLIPS SERVICE COMPANY; INDUSTRIAL FABRICATING CO.; JACKIE COOPER OLDS-GMC, INC.; JAMES BUTE COMPANY; MRS. WILLIAM JENKINS, individually, and doing business as Foster Septic Tank Cleaning; J. F. SMITH & SONS, INC.; KELSEY-HAYES CORPORATION, also known as Kelsey Axle & Brakes Co.; LAIDLAW WASTE SYSTEMS, INC.; BILL LANCE, an individual; LARRY GOAD & COMPANY; LASSITER ENTERPRISES, INC.; MASTER MOTOR REBUILDERS, INC.; MATERIALS RECOVERY ENTERPRISES, INC.; McALESTER PUBLIC SCHOOLS; BOB McBROOM, individually, and doing business as American Furniture Stripping; RAY McGEE, individually, and doing business as Quality Drum Service; GEORGE McKIDDIE, individually, and doing business as Capitol Grease Company; GREASE COMPANY; MEDLEY MATERIAL HANDLING, INC.; METROPLEX SANITATION, INC.; MISTLETOE EXPRESS SERVICE; MORRIS FIXTURE COMPANY; NAPKO CORPORATION; NEWMAN BROS. TRUCKING COMPANY; NOBLE CHEMICAL CORPORATION; THE CITY OF NORMAN, OKLAHOMA; NORTHROP WORLDWIDE AIRCRAFT SERVICE, INC.; OKLAHOMA TANK SERVICE, OKLAHOMA TRANSPORTATION COMPANY; PAGE INDUSTRIES, INC.; POWELL ELECTRICAL MANUFACTURING COMPANY; GEORGE

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POWELL, individually, and doing business as Powell Service Company; PREMIER INDUSTRIAL CORP., doing business as Kent Industries; RWR STEEL COMPANY; RABAR ENTERPRISES, INC.; RAM TRANSPORTS, INC.; RELIANCE UNIVERSAL, INC.; S&S PLATING COMPANY; SERMATECH INTERNATIONAL INC.; SOLVENT MANUFACTURING COMPANY, INC.; SOONER OIL PATCH SERVICES, INC.; SPECTOR RED BALL, INC.; STEELCRAFT, INC.; SUBLETT & ASSOCIATES, INC.; SUNWEST INDUSTRIES OF OKLAHOMA, INC.; RAYMOND SWITZER, individually, and doing business as Switzer & Gypsum Lime Company; T.I.P., INC.; THERMO KING SALES & SERVICE OF OKLAHOMA, INC.; TRIANGLE ENGINEERING COMPANY; TRIGG DRILLING COMPANY, INC.; UNITED PLATING WORKS, INC.; VICTOR EQUIPMENT CO.; WASTE SERVICE, INC.; WELCH ENTERPRISES, INC.; JIM WESLEY, individually, and doing business as Jim's Septic Tank; WESTERN COMMERCIAL TRANSPORT, INC.; WESTERN UNIFORM & TOWEL SERVICE, INC.; WESTRAN CORPORATION; WITCO, INC.; XAL CORPORATION; THOMAS ENGEL; A-BETTER SANITATION SERVICE, INC. UNIT PARTS; REAGENT CHEMICAL & RESEARCH, INC.; SUN EXPLORATION & PROD. CO.; CAMERON IRON WORKS; J C. PENNEY CO., INC.; ROHM & HAAS SEEDS, INC.; PHILLIPS PETROLEUM CO.; SOUTH PRAIRIE CONSTRUCTION CO.; THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.; NORDAM CORP.; NATIONAL CAN CORP.; LAND & MARINE RENTAL CO., formerly known as Tesoro Land & Marine Rental Co.; THE GOODYEAR TIRE & RUBBER CO.; CROWL MACHINE & HEAT TREATING CO.; CRANE CARRIER CO.; CORNING GLASS WORKS; DELTA FAUCET CO.; OCCIDENTAL CHEMICAL CORP.; JOHN

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ZINK CO.; GENERAL MOTORS CORP.; DURA-CHROME INDUSTRIES, INC.; THE DOW CHEMICAL CO., also known as Dow Industrial Service of the Dow Chemical Co., Dowell Division of the Dow Chemical Company & Brazos Oil & Gas Division of Dow Chemical Co.; IUTS LIQUIDATING CORP., formerly known as Industrial Uniform & Towell Supply, Inc.; CLYDE'S CARBURETOR SERVICE, INC.; AMOCO PRODUCTION CO., formerly known as Pan American Petroleum; DOVER RESOURCES, INC.; HUDIBURG CHEVROLET, INC.; AMF TUBOSCOPE; CONTAINER CORP. OF AMERICA; EASON OIL CO.; FOX-SMYTHE TRANSPORTATION CO.; INTERNATIONAL CRYSTAL MFG. CO.; KOBE, INC ; NELSON ELECTRIC POWER SERVICES, INC.; NEWSPAPER PRINTING CORP.; RYDER TRUCK RENTAL, INC., formerly known as Wilco Truck Rental, Inc.; SOUTHWEST ELECTRIC CO.; STAR MFG. CO. OF OKLAHOMA; CORKEN INTERNATIONAL CORP., formerly known as Corken Pump Co.; GLOW-LITE CORP. (ARTRA); GENERAL ELECTRIC CO.; FORD MOTOR CO.; CONOCO, INC.; E.I. DUPONT DE NEMOURS & CO.; CONTINENTAL OIL CO.; BLACKWELL ZINC CO., INC. (AMAX); DAY INTERNATIONAL CORP. (Electric Hose & Rubber); CENTRAL SALES PROMOTION, INC.; THE CHARLES MACHINE WORKS, INC.; SOONER FORD TRUCK SALES, INC.; W&W STEEL CO.; CHROMALLOY AMERICAN CORP.; BRITTAIN BROTHERS, INC.; WASTE MANAGEMENT OF OKLAHOMA, INC.; SERMATECH INTERNATIONAL, INC., formerly known as Sermatel, Inc.; ICO, INC., formerly known as Fodco, Inc., Sucker Rod Service &/or Rodcore, Inc.; HOMCO INTERNATIONAL, INC., doing business as A-1 Bit & Tool; TOM BROWN'S OPTICAL SERVICE, INC.,

Third-Party-Defendants,

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and

JONES-BLAIR COMPANY; THE O'BRIEN CORPORATION,

Third-Party-Defendants-Appellants.

ORDER
Entered June 28, 1995

Before MOORE, BRIGHT*, and BALLOCK, Circuit Judges.

* The Honorable Myron Bright of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

s/ Opal A. Carter
By Opal A. Carter
Deputy Clerk

APPENDIX E — APPROPRIATE PROVISION OF OKLAHOMA STATUTES TITLE 15 — CONTRACTS

OKLAHOMA STATUTES
TITLE 15 — CONTRACTS

§ 1. Contract defined

A contract is an agreement to do or not to do a certain thing.

§ 2. Requisites of a contract

It is essential to the existence of a contract that there should be:

1. Parties capable of contracting.
2. Their consent.
3. A lawful object; and,
4. Sufficient cause or consideration.

§ 51. Essentials of consent

The consent of the parties to a contract must be:

1. Free.
2. Mutual; and,
3. Communicated by each to the other.

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§ 53. When consent not real

An apparent consent is not real or free when obtained through:

1. Duress

2. Menace

3. Fraud

4. Undue influence, or

5. Mistake.

§ 63. Mistake of fact defined

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,

2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed.

§ 66. Mutual consent defined

Consent is not mutual unless the parties all agree upon the same thing in the same sense.

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§ 67. Consent — How communicated

Consent can be communicated with effect, only by some act or omission of the party contracting, by which he intends to communicate it, or which necessarily tends to such communication.

71. Acceptance must be absolute

An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character, which the proposer can separate from the rest, and which will include the person accepting. A qualified acceptance is a new proposal.

§ 72. Revocation of proposal

A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

§ 73. How proposal revoked

A proposal is revoked:

1. By the communication of notice of revocation by the proposer to the other party, before his acceptance has been communicated to the former.

* * *

3. By the failure of the acceptor to fulfill a condition precedent to a acceptance; or, . . .

Appendix E

§ 233. Rescission — Cases when party may rescind

A party to a contract may rescind the same in the following cases only:

1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

§ 235. Duty of party attempting rescission

Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, or reasonable diligence to comply with the following rules:

1. He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence, or disability, and is aware of his right to rescind; and

2. He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable, or positively refuses to do so.

APPENDIX F — EXCERPTS OF TRANSCRIPT ENFORCING SETTLEMENT DATED MARCH 27, 1991

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Docket No. C-86-1401-W

Oklahoma City, Oklahoma
March 27, 1991

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROYAL N. HARDAGE, et al.,

Defendants,

ADVANCE CHEMICAL COMPANY, et al.

Hardage Steering Committee
Defendants and Third-Party
Plaintiffs,

v.

ABCO, INC., et al.,

Third-Party Defendants.

TRANSCRIPT OF HEARING

BEFORE THE HONORABLE LEE R. WEST
UNITED STATES DISTRICT JUDGE

Appendix F

APPEARANCES:

Raymond Reott, Esq.
United States Pollution Control, Inc.
Washington, D.C.

Robert L. Roark, Esq.
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Also appearing:

Katherine Bunn, Esq.
John White, Esq.

Court Reporter

Lynn L. Hilton
3013 U.S. Courthouse
Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[18] allocation against him. He has been found liable and he would not be a participant in this phase of the trial, in any event.

THE COURT: Based upon Mr. Roark's assurance that you had reached an agreement and assuming that this sets out the terms and conditions, I free you from any further responsibility in connection with Phase III or until further order of the Court.

Court will be in recess until further notice.

(Recess was had, following which:)

THE COURT: Let the record reflect that the attorneys for various parties are meeting in chambers. I assume no one has any objection to that, as opposed to the courtroom. Who wishes to make a statement first?

MS. BUNN: I guess I will. Kathy Bunn for Cook Paint and Varnish Company.

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My understanding is we have reached a settlement agreement with the Steering Committee, the terms of which are that Cook will pay $515,000, which fully settles its obligations, subject to the other terms of the settlement agreement. Namely, my understanding is the orphan problem and the reopener.

THE COURT: Mr. Tomlinson, Mr. Roark.

MR. ROARK: That's correct, Your Honor. I think counsel has seen the agreement, and without going through all the details, my understanding is you agree with the terms of [19] the global agreement.

MS. BUNN: Yes.

THE COURT: Now, we may need to make a record with regard to Mr. Schulcz' clients and clients of Mr. Conger as third-party. Who wishes to make a statement in that regard?

MR. CONGER: I think as liaison counsel, I would suggest that it would be more appropriate for Mr. Schulcz to make a statement on behalf of — do you have a statement to make?

MR. SCHULCZ: Your Honor, I understood that you were going to enforce a settlement, based upon a letter that Mr. Harker —

THE COURT: I think the proper procedure may be to let me have a copy of that. Here it is.

Let the record reflect that I have a copy of a letter from the Harker firm dated March the 22nd, 1991, addressed to Mr. William Conger, Esquire. It's signed by Timothy L. Harker.

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Would you, if you will, Mr. Conger, recite the gist and substance of that, or that portion of it that you think is — well, I can do that for you.

"Dear Bill, just to confirm my conversation with you earlier this afternoon, Reliance Universal, now Akzo Coatings, Inc., is prepared to settle the HSC claim for one dollar per gallon offer. The O'Brien Corporation and Jones-Blair are [20] prepared to settle the HSC claims on the same basis of one dollar per gallon if Cook Paint does not litigate the HSC response cost phase.

"Cook Paint will settle or not based on the willingness of its insurance carrier to assume a portion of the settlement cost acceptable to Cook Paint or on the basis of some alternative arrangement acceptable to Cook Pain and its insurance carrier. Cook's corporate counsel, the firm of Blackwell-Sanders, is in Oklahoma City today to advise them of that decision.

"You indicated that you would apprise the HSC of the Akzo acceptance and also the positions of other companies, Cook, Jones-Blair and O'Brien, in time for settlement to occur and to avoid trial for Akzo and, as appropriate, for the other three companies. Sincerely, Timothy L. Harker."

And copies of that to Paul Dague, Paul Brooks, Jr., Patti Houle and Pat Curran. I'll have that marked and made a part of the record.

Now, I think for the record, before we hear from Mr. Schulcz, you should state to the Court your understanding of the terms and conditions having been complied with.

MR. CONGER: Your Honor, in light of the statement by

Ms. Bunn on behalf of Cook Paint, it seems to me that all of the protocols and requirements set forth in Mr. Harker's letter are performed and therefore, that the settlement should [21] go through on behalf of O'Brien and Jones-Blair, pursuant to the instructions of this letter.

MR. CONDREN: I'll just voice, for the record, on behalf of Cook Paint, we think that we have settled and that we're avoiding the response cost trial. It's a matter of record.

THE COURT: The Court agrees with that and has advised Mr. Schulcz that it intends to enforce the settlement with regard to Jones-Blair and other clients in accordance with that. But I also want to allow him an opportunity to make a statement into the record.

MR. SCHULCZ: Your Honor, I conveyed to Mr. Conger on Monday that the terms of that letter had changed and that O'Brien and Jones-Blair wish to reserve that right. And at this time, we are without authority from those people to enter the settlement.

I think that's all I need to say.

MR. CONGER: I would like to respond for the record that I don't think that Mr. Schulcz even knew that this letter existed on Monday before he talked to me. I have spoken to Mr. Harker as late as yesterday and advised him of the status of these proceedings. As it existed yesterday, Mr. Harker never at any time indicated to me about changing his previous instructions to me.

THE COURT: Okay. Go ahead, Mr. Schulcz.

[22] MR. SCHULCZ: I feel I need to respond for the record

to — I was aware of that letter, Your Honor. Mr. Harker conveyed to me on Friday that he was writing it. He talked to me specifically on Monday morning, indicated that he would convey the contents of the change to Mr. Conger. On his instructions, I made sure that we had reserved the right to decide.

THE COURT: All right. As the Court has previously announced, it's my opinion that the terms and protocols and conditions have been complied with; that Mr. Conger is authorized to settle the case on that basis.

The Court will enforce the settlement in that regard.

In addition to that, there is a practical matter that I feel obligated to state. The Court is not about to undertake a trial of this magnitude and size on behalf of two diminimus parties. Costs would very quickly exceed any amount in controversy as between them and certainly exceed any differences in their positions now from the time that that was stated.

For those reasons, the Court will enforce the settlement.

I do need to ask counsel, there are three matters that I need to discuss with you about where that leaves us. Let me just start on the claims that are possibly remaining on [23] liability. Arrow Tank.

MR. TOMLINSON: I think we have a couple of issues remaining on response costs.

THE COURT: First, I want to take up Arrow Tank on liability costs, on the liability question. What do we have left and when do we want to take that up?

MR. ROARK: We have an agreement with Arrow Tank to stipulate on response costs, part of their liability at $15 million. HSC is entitled to recover that amount.

We do need to try the other aspects of their liability case. We anticipate that will take somewhere between two and three hours. Both of our witnesses have been released. I have one coming from out of town. We could try that perhaps tomorrow afternoon or if the Court's schedule would be better next week.

THE COURT: Tomorrow afternoon is fine, if that's agreeable with the parties. I just wanted to kind of find out now, if we could.

MR. WITZE: As far as the timing is fine. To make sure that we're clear on the stipulation, Arrow is obviously contesting it's liable for any of the response costs.

However, if the Court should determine that Arrow is liable for response costs, we stipulate that $15 million is — whatever our share of that would be proper. We're reserving the liability issue obviously to response costs.

* * *

[28]CERTIFICATION

I, Lynn Hilton, Official Court Reporter, do hereby certify that the foregoing 27 pages constitutes a true and complete transcription of my shorthand notes as taken by me on the date set forth herein.

Appendix F

Dated this the 5th day of April, 1991.

s/ Lynn Hilton
Lynn Hilton, CSR, CP

APPENDIX G — LETTER DATED MARCH 22, 1991 FROM MR. HARKER TO MR. CONGER

THE HARKER FIRM

Attorneys

Timothy Harker and Associates
(202) 223-9880

2021 K Street, N.W., Suite 310
WASHINGTON, D.C. 20006

March 22, 1991

BY TELEFAX

William Conger, Esq
Hartzog, Conger, Carson
& Hargis
1600 Bank of Oklahoma Plaza
201 Robert S. Kerr
Oklahoma City, OK 73102

Dear Bill:

Just to confirm my conversation with you earlier this afternoon, Reliance Universal (now Akzo Coatings, Inc.) is prepared to settle the HSC claim for the $1.00 per gallon offer. The O'Brien Corporation and Jones-Blair are prepared to settle the HSC claims on the same basis of $1.00 per gallon if Cook Paint does *not* litigate the "HSC response cost" phase. Cook Paint will settle or not based on the willingness of its insurance carrier to assume a portion of the settlement cost acceptable to Cook Paint or on the basis of some alternative arrangement acceptable to Cook Paint and its insurance carrier. Cook's corporate counsel, the firm of Blackwell, Sanders, is in Oklahoma City, today, to advise them on that decision.

Appendix G

You indicated you would apprise the HSC of the Akzo acceptance and also of the positions of the other companies (Cook, Jones-Blair and O'Brien) in time for settlement to occur and to avoid trial for Akzo and, as appropriate, for the other three companies.

Sincerely,

s/ Timothy L. Harker
Timothy L. Harker

TLH: daj/B5

cc: Paul Dague
Paul Brooks, Jr.
Patti Houle
Pat Curran

APPENDIX H—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA DENYING SUMMARY JUDGMENT MOTION

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-86-1401-W

Oklahoma City, Oklahoma

Dated: November 29, 1993

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, et al.,

Defendants.

TO: ROBERT D. DENNIS, CLERK

Please enter the following minute order in the above-entitled case.

This matter comes before the Court on the Motion for Summary Judgment filed by third-party defendants The O'Brien Corporation and Jones Blair Company pursuant to Rule 56, F.R.Civ.P. The third-party plaintiff, the Hardage Steering Committee, has responded in opposition and the third-party defendants have replied. Based upon the parties' submissions, the Court finds there are genuine issues of disputed fact that render summary judgment inappropriate. Accordingly, the

Appendix H

Motion for Summary Judgment should be and is hereby DENIED.

Counsel Notified_____

Clerk to Notify__X__

s/ Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

APPENDIX I — EXCERPTS OF TRANSCRIPT DATED DECEMBER 21, 1993

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Docket No. C-86-1401-W

Oklahoma City, Oklahoma

December 21, 1993

UNITED STATES OF AMERICA,

Plaintiff,

V.

ROYAL N. HARDAGE, ET AL,

Defendants,

ADVANCE CHEMICAL COMPANY, ET AL.,

Hardage Steering Defendants
and Third-Party Plaintiffs,

v.

ABCO, INC., et al.,

Third-Party Defendants.

Appendix I

TRANSCRIPT OF HEARING
DECEMBER 21, 1993
BEFORE THE HONORABLE LEE R. WEST
UNITED STATES DISTRICT JUDGE

[2] A-P-P-E-A-R-A-N-C-E-S

Appearing for the Jones-Blair Company and The O'Brien Corporation:

Mitchell D. Blackburn
Attorney at Law
Oklahoma City, OK

Appearing for the Hardage Steering Committee:

Robert L. Roark
Attorney at Law
Oklahoma City, OK

Court Reporter

Lynn L. Hilton
3001 U.S. Courthouse
Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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[4] THE COURT: Are the parties ready to proceed in the case of U.S.A. versus Royal Hardage?

MR. ROARK: Plaintiffs are, Robert Roark on behalf of the Hardage Steering Committee.

MR. BLACKBURN: The Defendants are, Your Honor, Mitch Blackburn on behalf of Jones-Blair and O'Brien.

THE COURT: Do you wish to make an opening statement?

MR. ROARK: Briefly, if I may.

THE COURT: Sure.

OPENING STATEMENT

BY MR. ROARK:

In this proceeding, what strikes me as the most interesting thing about this case is that the parties are contending very diverse theories and they focus on very different sets of facts to get to the result which both parties wish the Court to reach.

Jones-Blair and O'Brien contend that this case is about Bill Conger. They say that Mr. Conger exceeded his authority when he made an agreement on behalf of Jones-Blair and O'Brien with the HSC. They say that he knew or should have known when he reached this agreement on their behalf that the letter on which he was relying, which is the now-famous March 22, 1991 letter that Mr. Harker wrote to Mr. Conger, they say that he knew or should have known that [5] that letter was no longer valid.

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They say that, and they will present evidence, I believe, that Mr. Schulcz allegedly told Mr. Conger on Monday, March 25th that there had been a change of position. They say that even on March 27th, even if Mr. Schulcz didn't communicate that, that he knew or should have known that he had no authority because of comments that Mr. Schulcz made that morning.

The evidence that we will present from both Mr. Conger and Mr. Chris Condren, on behalf of Cook Paint, will be, first of all, that there was no such communication whatsoever on March 25th to Mr. Conger about the March 22nd letter no longer being valid. That conversation did not occur. It did not occur effectively enough to communicate it to Mr. Conger.

Secondly, on March 27th, when the negotiations occurred, Mr. Conger did not enter into any agreement on behalf of Jones-Blair and O'Brien; this is not about an agreement that Mr. Conger did or did not enter into. Therefore, whatever Mr. Schulcz may have said to Mr. Conger on that day is irrelevant.

The HSC believes, and our evidence will show that what this case is about is that the March 22, 1991 letter that Mr. Harker wrote to Mr. Conger had been communicated also to Cook Paint and its counsel and its negotiator on the scene, on [6] March 27th, Mr. Chris Condren. Mr. Condren knew about the letter; nobody ever told him anything about the letter not being valid.

When the parties began to negotiate on Wednesday March 22nd, Cook Paint and the Hardage Steering Committee reached an agreement. As a result of their having reached that agreement, the terms of the letter became immediately effective. That meant that Jones-Blair and O'Brien were also bound to accept the Hardage Steering Committee's dollar-per-gallon offer.

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The evidence will show that at that point in time any comments that were allegedly made by Jones-Blair and O'Brien or Mr. Schulcz, who was on the scene, came too late. They are ineffective after a contract is already made to do anything to effect the rights of the parties, particularly where the rights of third parties — in this case, Cook Paint and the HSC — are involved. When both of those parties reached an agreement and changed their position, based upon the fact that that letter had not been revoked and there had been no communication of that, Jones-Blair and O'Brien were ineffective on that day to do anything about that agreement.

There is a stipulation in the Pretrial Order that if the Court enforces the settlement agreement, which we believe the evidence will justify, that there is no dispute about the amount of money involved here; that is, that Jones-Blair would [7] be indebted to the HSC as a result of that settlement agreement and for $24,825, and that O'Brien would be indebted to the HSC as a result of the settlement agreement for $43,022.

We have also asked the Court to award prejudgment interest at the legal rate in Oklahoma, it is six percent, since those are unliquidated, undisputed amounts effective as of March 27, 1991.

OPENING STATEMENT

BY MR. BLACKBURN:

What I believe Mr. Roark just went through, I believe, is a far cry from what you were hearing on Wednesday the 27th, 1991. When the parties came before you on Wednesday 27th of '91, the issue as reflected in the transcript was whether or not Mr. Conger

had the authority to settle this matter on behalf of Jones-Blair and O'Brien.

The review of the transcript reflect that that's the way you perceived the issue. Mr. Conger has the authority based upon the letter. And when they went to the Tenth Circuit Court of Appeals, that's what they argued, Mr. Conger had the authority.

Now, when all is said and done, they come back down and there are problems with that theory, the problem being Mr. Conger knew about a dispute before he ever communicated it to the HSC. Consequently, if you accept the notion that in order to have a binding contract, you not only have to have an [8] offer and acceptance, but a communication of that acceptance.

Mr. Conger couldn't effectively communicate that acceptance. He knew about the dispute; he knew that there was some question surrounding the validity of the letter at the time. He was duty-bound to go and check that out. He couldn't simply disregard the dispute and proceed with blinders on.

Now, obviously there is a dispute regarding whether or not Mr. Conger and Mr. Schulcz had the conversation on March 25, 1991. It has been in dispute ever since. Mr. Conger now says, No, no such conversation ever occurred. I believe that you may recall on March 27, 1991 when he was confronted with that allegation by Mr. Schulcz, he didn't say, no, Your Honor, no such conversation occurred. No. He said only, I don't believe Mr. Schulcz knew about the letter before he talked to me on Monday. Now, that is a far cry from, No, no such conversation occurred.

That is where we get around to the idea now after the fact that Mr. Condren, on behalf of Cook Paint, somehow had the

authority to consummate the settlement on behalf of Jones-Blair and O'Brien and the HSC. The novelty of this theory is that under the HSC position right now, they are saying they settled with Jones-Blair and O'Brien and they didn't even know it. They settled when they settled with Cook Paint and only learned about it after the fact.

Now, Your Honor, that won't — that just won't fly.

[9] The letter was sent from Mr. Harker to Mr. Conger. It didn't say, If anybody else happens to see this letter, they are granted with some authority to settle on behalf of Jones-Blair and O'Brien. A relatively simple letter, You have the authority to do this, if this occurs. It didn't occur.

Let's talk about reliance on the letter. As Mr. Roark said, they are going to say that Cook Paint relied on that letter. The evidence is going to show they didn't rely on the letter when they began negotiations, they didn't rely on the letter when they agreed on the substantive terms of the negotiations. It was only after the fact, the final condition, Cook Paint will settle with you if Jones-Blair and O'Brien will settle, also. That is the first time the issue arose.

Now what reliance is that? The only thing they relied on that letter for is they would be able to satisfy that condition. There was no detrimental reliance on that letter and consequently, Jones-Blair and O'Brien shouldn't have to stand along the sidelines mute.

Then we get to the issue of repudiation or recision, was it effective? Mr. Schulcz was right there at the moment, within a heartbeat after this agreement between Cook Paint and Jones-

Blair — and the HSC. Mr. Schulcz protested, brought this matter to Your Honor. What reliance, what detrimental reliance occurred during that period of time?

The concessions made by Cook Paint and the HSC, one [10] to another in order to effect a settlement, if in fact the letter was no good and Jones-Blair and O'Brien didn't want to settle, those concessions, neither were bound, because the condition was still out there. The HSC wasn't bound to accept Cook Paint and Cook Paint wasn't bound to accept the HSC. We would assume you would have simply proceeded to trial.

I think that although the theory of this case has shifted on behalf of the HSC, there is three different ways to skin the cat. One, Mr. Conger knew about the revocation of the letter. Two, even if he didn't, he found out on the 27th and there was no effective communication of the acceptance of the outstanding offer. Three, even if by some miraculous way there was an effective communication, the repudiation was instantaneous and there was no detrimental reliance suffered.

I believe that's what the evidence will show.

THE COURT: Who is going forward first with the proof?

MR. ROARK: The Hardage Steering Committee will go forward.

THE COURT: Will all witnesses who expect to testify in this case stand, raise your right hand and be sworn.

(Whereupon, Witnesses are sworn.)

Appendix I

MR. ROARK: Bill Conger.

THE COURT: For the record, would you state your full name and spell your last name.

* * *

[22] that correct?

A. True.

Q. The record is pretty clear that after some preliminary discussion before Judge West, Cook Paint, or perhaps the HSC, requested a continuance to do some further negotiations because they believed that Cook Paint and the HSC might be able to reach an agreement; is that your recollection?

A. That's my recollection.

Q. Can you tell us, Mr. Conger, who was conducting the negotiations that morning on behalf of Cook Paint?

A. Chris Condren. And let me correct that, Chris Condren and a lawyer from Kansas City, I believe her name was Kathy Bunn.

Q. Were you involved at all in the detailed negotiations between the Hardage Steering Committee and Cook Paint that morning?

A. No, I was not.

Q. Did you do any negotiating that morning, March 27th, on behalf of Jones-Blair or O'Brien?

A. No.

Q. Did you make any agreements that morning on behalf of Jones-Blair and O'Brien with the Hardage Steering Committee?

A. No, I did not.

Q. At some point that morning, there was an off-the-record conference in front of Judge West; is that correct?

A. True.

* * *

[31] respect to Jones-Blair and O'Brien, did you not?

A. It confirmed my authority, yes.

Q. Your authority, your authority to do what?

A. Well, it confirmed Mr. Harker's instructions to me to settle on behalf of Reliance and what I was to do with respect to Jones-Blair and O'Brien, vis-a-vis Cook Paint.

Q. Again, you felt that this letter constituted your authority with respect to Jones-Blair and O'Brien?

A. That's right.

Q. I believe you previously testified that you made no agreements on behalf of Jones-Blair and O'Brien on March 27, 1991, did you not?

A. That's right.

Q. But you are also of the opinion that Jones-Blair and O'Brien settled with the HSC on March 27, 1991, correct?

A. Yes, that's true.

Q. This letter constituted your authority to settle on behalf of Jones-Blair and O'Brien. That is your position, correct?

A. Yeah.

Q. A settlement occurred, that is your position, correct?

A. A settlement occurred.

Q. But you never exercised the authority in that letter on March 27, 1991, correct?

A. Well, I advised the Court of the letter, the protocols contained in the letter and my opinion that those protocols had

* * *

[40] Q. This transcript is of proceedings that occurred after the off-the-record conference which you had with the Judge, correct?

A. That's right.

Q. This transcript is of proceedings which occurred after you became aware that there was a dispute regarding whether Jones-Blair and O'Brien wanted to settle, correct?

A. That's right.

Q. So, actually, I guess I mischaracterized it awhile ago when I said that you were thinking on your feet and reacting, you knew about this ahead of time, before you went in there, correct?

A. I knew what Mr. Schulcz's position was, yes.

Q. You knew that Mr. Schulcz was saying that he had revoked the letter, correct?

A. Yes.

Q. You had had time to give that some thought, correct?

A. Yes, I suppose so.

Q. He didn't just catch you flat footed with it, just hit you cold right there in front of the Judge and say, "I revoked the letter on Monday," did he?

A. No, he didn't.

Q. You viewed exhibit, Plaintiffs Exhibit 1, as your authority to settle on behalf of Jones-Blair and O'Brien if the terms of the letter were met, correct?

[41] A. Yes.

Q. You didn't ever delegate that authority to anybody, did you?

A. No.

Q. You didn't say, "Mr. Condren, I'm busy, I will be talking to the Judge, making notes, getting ready for trial. You carry the ball on this one; I got the letter, you close the deal for me," did you?

A. I didn't say that.

Q. Let's talk about the timing of things, how things occurred on March 27, 1991.

A. Okay.

Q. Obviously, at some point on March 27, '91, you became aware that a dispute existed, that Jones-Blair and O'Brien was at least saying they didn't want to settle, correct?

A. That's what I have been telling you.

Q. You became aware of that before the off-the-record conference, you previously testified to that, correct?

A. Just moments ago.

Q. You subsequently had a conversation with either Mr. Roark or Mr. Tomlinson, did you not?

A. Subsequently a conversation with them?

Q. Correct.

A. Yes, I did.

Q. You knew about the dispute regarding the letter before you [42] had that conversation with Mr. Roark and Mr. Tomlinson, did you not?

A. I believe I did. I'm not sure what conversation you are talking about, but I assume I did.

Q. Do you recall Mr. Tomlinson coming up and asking you, you know, "Jones-Blair and O'Brien going to settle with us?"

A. No, I really don't. I had passed the — I had passed their position on to the HSC earlier, to someone at the HSC, just as a point of information to tell them where these parties were. Who that was, I don't recall.

Q. You know, the monolithic HSC, you don't recall who that was?

A. That's what I just said, I don't recall exactly who it was. They had divided up their settlement among various members of their team. So I was passing it on to whoever it was.

Q. You are aware that Mr. Roark previously testified that he wasn't aware of the letter or the position prior to March 27, 1991, correct?

A. I'm not aware of what he has testified to.

Q. Have you not had any conversations with Mr. Roark regarding this matter prior to today?

A. Yes, I have had conversations with him.

Q. That subject just never came up?

A. He has never told me what he has testified to, no.

[43] Q. Did he ever tell you when he first became aware of the letter?

A. He may have, I just don't recall.

Q. But at some point, on March 27, 1991, you went to either Mr. Roark or Mr. Tomlinson and you said, "Yeah, there is this letter," correct?

A. You know, I don't recall doing that; maybe I did. Chris Condren had the letter and there was no secret about the letter. I can't remember if they were around me at the time or not.

Q. Well, if Mr. Tomlinson was to testify that that's the way things happened, that you came to him and you said, "Yeah, there is this letter," would you have any reason to say, "No, that's wrong?"

A. No, I wouldn't have any reason to say that.

Q. Let's talk about what you just said there a second ago. This was no secret that if Cook Paint settled, Jones-Blair and O'Brien would go along, correct?

A. Okay.

Q. Did you have any discussion with Ms. Bunn prior to March 27, 1991 regarding settlement?

A. Yes.

Q. Ms. Bunn has testified that she didn't learn about this until she heard it from the HSC?

A. Didn't learn about what?

* * *

[52] what Mr. Schulcz was saying, did you?

A. No, I did not.

Q. Mr. Roark previously talked about your duty, your duty to the Court when this issue came up and how you had a duty to advise the Court of the existence of the letter. You agreed with that, right?

A. Yes.

Q. Let's talk about another duty. There you are, you are before the Judge. You have got Mr. Schulcz, who you know represents Jones-Blair and O'Brien, saying they don't want to settle. Didn't you think you had a duty at that point in time to go and check and make sure?

A. No, I did not.

Q. You felt comfortable in just assuming that Mr. Schulcz was wrong in going forward?

MR. ROARK: I object. This has been asked and answered about six times. He is arguing with the witness.

THE COURT: Sustained.

Q. One last point, Mr. Conger. You are standing there on March

27, 1991, Chris Condren comes up to you and says, "There is a dispute, Schulcz is saying Jones-Blair and O'Brien don't want to settle," correct?

A. Yes.

Q. You pull the letter out of your pocket and you show it to him, correct?

[53] A. I don't remember the order in which I gave him that letter.

Q. Did you participate in any of the negotiations between Cook Paint and the HSC?

A. That day?

Q. Yeah.

A. No.

Q. When they all left after the morning recess to go and negotiate, did you go with them?

A. No.

Q. At that point, there was no dispute. I mean, the issue hadn't arisen, correct?

A. No.

Q. The issue surrounding the letter?

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A. Right.

Q. The first time you saw Mr. Condren after that point was when the dispute had arisen, correct?

A. I don't know when the dispute arose. When I saw Mr. Condren and Ms. Bunn and Mr. Schulcz, there was agitated conversation amongst them. I simply walked up and learned what it was about.

Q. That's when Mr. Condren advised you that Mr. Schulcz was saying Jones-Blair and O'Brien didn't want to settle?

A. It was sometime about that time.

Q. That would have been the first time when you would have

* * *

[71] Q. Did he ever say anything to you in that conversation that you just described, that initial statement, about the letter in front of you, one way or the other; whether it existed or whether it was any good?

A. The letter was never mentioned to Mr. Schulcz until I told him we were going to settle.

Q. After you had already reached an agreement?

A. After we reached agreement with the HSC and we went down from the elevators toward Judge Phillips, had a heated discussion. I said, "We have this letter; we are going to settle." He said, "The letter is no good." I said, "You just watch."

We went back to Judge West. Judge West was involved, and had a discussion, Mr. Conger was there, and I agreed with Mr. Conger's version of events. Judge West advised us that he was inclined to enforce the settlement, but he would want to do it on the record and give everyone a chance to have their say. Everyone had their say on the record and settlement was enforced.

Q. When he made the statement to you that the letter was no good, was that the first notice that you ever received from Mr. Schulcz where he even mentioned the letter or some change in position?

A. That's the first time that Mr. Schulcz and I had ever discussed anything with respect to the letter and the first

* * *

[193] THE WITNESS: Paul David Dague, D-A-G-U-E.

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. What do you do for a living?

A. President of Jones-Blair Paint Company.

Q. How long have you been president?

A. January 1, 1979.

Q. Paint company, had much involvement with environmental law and environmental litigation?

A. Well, for about the last ten years, yes.

Q. I believe you are familiar with Timothy Harker and The Harker Firm?

A. Yes.

Q. We know, based upon everything we have heard today, that The Harker Firm represented Jones-Blair. How long has The Harker Firm represented Jones-Blair?

A. Since approximately in 1982.

Q. Their representation, did it start from the very beginning, the representation of Jones-Blair in connection with this matter?

A. Yes. We had had a previous environmental Superfund site. I knew Tim previous to that and employed him for a bioecology site down in Texas. When this one came up, I immediately contacted him. I already had been working with him for some time.

* * *

[200] very, very clear on it and that we could win the case.

Q. Do you recall anything else about why he had apparently changed his mind and decided that you ought to stick it out?

A. I don't really remember. I'm sure Tim went through a number of reasons like he always does, but what I can really remember is that on Friday, he was recommending that we settle if Cook did. And on Monday, he was recommending that we have really have

a better case than I thought, after thinking it over. We ought to stand and fight. We ought to fight them tooth and nail.

I agreed with him. That really fit my temperament better than giving in to these guys.

Q. Has there ever been an instance prior where you refused to follow Mr. Harker's recommendation?

A. No, sir, I can't recall. You know, in my opinion, Tim is probably the best Superfund lawyer in the U.S. He has got good common sense. We are able to work with him real well. I just haven't had any — I haven't had an issue from a business standpoint to say, "Hey, that doesn't make any sense from a business point of view." He is the legal expert.

You know, I don't know a dadgum thing about the law except what you guys teach me in these things, but he is a good businessman. I have had no cause to say, "Hey, Tim, that is not smart." You know, that doesn't mean I haven't asked him questions, I have asked him questions. You know, "What is

* * *

APPENDIX J — DEPOSITION OF ROBERT ROARK, ESQ., COUNSEL FOR HSC (ADMITTED TO RECORD IN LIEU OF DIRECT TESTIMONY)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

C-86-1401-W

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ROYAL N. HARDAGE, et. al.,
Defendants,

ADVANCE CHEMICAL COMPANY, et. al.,

Hardage Steering Committee
Defendants and Third-Party
Plaintiffs,

ABCO, INC., et. al.,
Third-Party Defendants.

DEPOSITION OF ROBERT ROARK
TAKEN ON BEHALF OF
JONES BLAIR COMPANY AND O'BRIEN CORPORATION
ON SEPTEMBER 23, 1993
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES

For the Hardage Steering — Mr. Robert D. Tomlinson
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Main and Broadway
Oklahoma City, Oklahoma 73102

Appendix J

For Jones Blair Company and O'Brien Corporation:

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Hastie and Kirschner
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210 W. Park Avenue
Oklahoma City, Oklahoma 73102

Reported By:

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Suite 807, Two Leadership Sq.
Oklahoma City, Oklahoma 73102
(405) 232-2804

[2] STIPULATIONS

It is stipulated that the deposition of ROBERT L. ROARK may be taken on September 23, 1993 at 4:45 p.m. before Vicki Maltsberger, CSR, CP, CM, pursuant to agreement and the Federal Rules of Civil Procedure.

It is stipulated that all objections, except objections as to the form of the question, may be made at the time of trial when said deposition is offered in evidence, as if said objections were made at the time of taking said deposition.

* * * * * *

ROBERT L. ROARK,

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q State your name for the record, please.

Appendix J

A Robert L. Roark.

Q Mr. Roark, would you briefly describe for me your involvement in the second trial of the Hardage litigation?

A I was in charge of the third-party litigation which involved liability issues of the third-party defendants, and that included settlement negotiations with various third-party defendants.

Q Was there anyone else who could enter into a binding settlement agreement on behalf of the HSC besides

* * *

[4] connection or reason why it made sense for them to be involved versus our firm to be involved.

Q And your firm, of course, was the line of communication between Cook Paint, Jones-Blair and O'Brien?

A Most of the time, yes. And we were the line of communication with respect to de minimis parties, which included Jones-Blair and O'Brien. And it did not include Cook Paint. But we dealt with some of the Cook Paint issues in this law firm, yes.

Q So settlement discussions between the Hardage Steering Committee and Cook Paint, Jones-Blair and/or O'Brien would have been between whoever their representatives were and yourself; is that correct?

A For the most part, yes.

I cannot categorically tell you that some other attorney on

behalf of the HSC may not have talked with those parties' counsel at some point in time.

I know that our firm almost always generated the offer to the de minimis parties because it was a uniform offer. As we proceeded through the year-and-a-half of litigation, that offer changed from time to time.

We would make an offer, communicate to it Bill Conger because he was representing the third-party de minimis parties as a group.

He would, in turn, communicate it to the third

* * *

[6] MR. BLACKBURN: Excuse me?

MR. TOMLINSON: Time frame to the question.

MR. BLACKBURN: The week preceding. Within that week.

THE WITNESS: No. I have no recollection of any other party on behalf of the HSC during that week.

Q (By Mr. Blackburn) Were you having discussions with Mr. Conger during that period of time?

A Yes.

Q Can you recall for me the substance of those discussions?

Appendix J

A With respect to —

Q Either of the three parties; Cook Paint, Jones-Blair or O'Brien?

A Not specifically, other than his generally informing us during the three days of that week, the 25th, 26th and 27th, that Jones-Blair and O'Brien had as of that time not accepted our offer on the table to de minimis parties. And that Cook Paint was not agreeable to the — what we called the global settlement offer to the defendants and major third parties in the case.

Other than him just telling us that they hadn't reached any agreement and weren't willing to settle on our terms, no. No, I have no other specific recollection.

Q On March 25th following the continuance that was

* * *

[14] said, "And the Court was going to enforce this letter"; is that correct?

A I'm sorry? Say that again.

Q The first time that Mr. Condren specifically mentioned the letter to you —

A (Witness nods head yes.)

Q — in response to you reminding him of the condition —

A Yes.

Appendix J

Q — in that same conversation, Mr. Condren also said that the Court was going to enforce the letter. Is that your recollection?

A He made some reference to that effect. That there was a letter agreement, and there was no problem doing this. And that we were going to go in and announce to the Judge that we had an agreement.

And at some point, as Mr. Tomlinson has told you, it became evident that for some reason or another, Jones-Blair and O'Brien or Mr. Schulcz had raised some questions, and he just commented that there was going to be — it was a done deal, and there was a letter and that we were all going to make a record on it.

Q Do you know whether the dispute — Mr. Schulcz raising this contention, do you know whether that occurred prior to Mr. Condren's referring to the letter or

* * *

[16] whatsoever with respect to what Cook Paint was doing or not doing.

Q (By Mr. Blackburn) But did you previously state that Mr. Condren alluded to some dispute in his discussion with you?

A Only at the very final moment when he said — when he said, "We have got a deal, and Jones-Blair and O'Brien are going to be a part of the deal." And he alluded to some issue that apparently had arisen and indicated also that the Court was going to enforce it, and we needed to go back in chambers and make a record.

Appendix J

Prior to him saying that, I had absolutely no knowledge, have no recollection of any dispute or any question about anybody's authority or anything else with respect to the position that Jones-Blair and O'Brien are now taking.

Q Did you have any knowledge of the letter prior to the conversation in which he said that?

A No, I do not think so.

Q Was Ms. Bunn there during your discussions with Mr. Condren?

A I'm sure she was from time to time. She was there representing Cook Paint, and I don't have a specific recollection of what particular conversation she was there or not there. But she was a representative of Cook Paint [17] at Court that morning.

Q Do you recall any specific instance where she participated in the negotiations, or did Mr. Condren handle that?

A I have a general recollection that she was involved, and I probably talked to her. I have a more specific recollection of my conversation with Mr. Condren that I just related to you.

Q After you have had the discussion with Mr. Condren that we just discussed, what happened next?

A We talked back into Judge West's chambers and made a record which is reflected by the transcript.

Q Did you speak with Mr. Conger during this period of time?

Appendix J

A What period of time?

Q In between your conversations with Mr. Condren regarding the letter and going back into the chambers and going on the record.

A I think briefly. He confirmed what Chris had said. There was a letter, and that basically he confirmed what Chris had said. But I don't have a specific recollection of a particular conversation. He was around and in and out, and I suspect we did visit with him briefly on that.

Q Do you recall discussing it with anyone else?

* * *

APPENDIX K — DEPOSITION OF ROBERT TOMLINSON, ESQ., COUNSEL FOR HSC (ADMITTED TO RECORD IN LIEU OF DIRECT TESTIMONY)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

C-86-1401-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, et. al.,

Defendants,

ADVANCE CHEMICAL COMPANY, et. al.,

Hardage Steering Committee
Defendants and Third-Party
Plaintiffs,

ABCO, INC., et. al.,

Third-Party Defendants.

DEPOSITION OF ROBERT TOMLINSON
TAKEN ON BEHALF OF
JONES BLAIR COMPANY AND O'BRIEN CORPORATION
ON SEPTEMBER 23, 1993
IN OKLAHOMA CITY, OKLAHOMA

APPEARANCES

For the Hardage Steering — Mr. Robert L. Roark
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(405) 232-2804

* * *

[4] Q Well, maybe if I ask you where I'm headed, you'll understand.

A Just tell me what you want to know, and I will either agree with you or disagree with you.

Q Let's say I'm a PRP. You have named me in your third-party complaint. And I have decided that I want to get out. I want to settle.

Who do I go to? Who speaks for the Hardage Steering Committee if I want to settle your claim against me?

A Myself and Robert Roark, either/or.

Q Either/or. Was there —

A With regard to settlement, Robert handled much more of that than I did.

Q Was that the only division of responsibilities that you had?

A When it came to trying the lawsuit, we were going to divide up certain issues and witnesses, but right now, I can't remember what they were.

I do recall that I was going to handle our cost recovery. And that I was going to put on the evidence regarding how much money we had spent and what the costs of the remedy would be.

And I think he was going to handle liability issues and the third-party defendants and allocation

* * *

[17] either remove that condition or didn't have it.

Q I believe you testified just second ago that when the discussion with Mr. Condren turned to the issue of —

A Whose name did you just use?

Q Condren. When it turned to the issue of settling with everybody, Mr. Condren stated that that was possible because of some authority that Mr. Conger had; is that correct?

A Yeah. I was standing there. He was not speaking to me, because I was not the negotiator. I was an observer at that point.

And at that point, it was down to those last three. And that what is I recall him saying; that there was a letter that gave Bill Conger authority to settle.

I think what he said was, "There is a letter that if Cook Paint settles, the other two also settle." I think that is probably the words he used. And I didn't know what he was talking about.

Q So did you guys break up, then, and go and confirm whatever needed to be confirmed, or what happened after that?

A I don't think it was much longer until we went back ir there. But somewhere between the hallway and the judge's chambers, I sensed or knew that there was some form [18] of dispute. I didn't know exactly what it was. And I don't know how I came to know that.

I mean I may have heard Mr. Schulcz say something, or I may have been able to tell from his demeanor that he didn't agree with it, or I don't know. But it was after that; shortly after.

I don't think there was a long delay. Shortly after that comment was made —

Q Were you privy to that, or did you participate in the initial meeting in Judge West's chambers that wasn't transcribed?

A I don't know if I did or not. I don't remember.

MR. ROARK: I'm sorry. What meeting are you referring to counsel?

MR. BLACKBURN: It was my understanding, and certainly Mr. Tomlinson can correct me if I'm wrong, but it was my understanding that prior to the in-the-chambers hearing, we'll call it, that was transcribed, that there was an initial meeting before the judge off the record.

MR. ROARK: The transcript of the 27th, I think, refers to two sessions. Are you referring to some other session off the record?

MR. BLACKBURN: Yes.

THE WITNESS: What I'm referring to, and I'm the one that told you that, is that during the recess before [19] the final portion of the transcript, it's obvious to me that Judge West knew of a dispute before the record began.

And I don't know how he knew of that. I don't know if Conger and Schulcz and Condren walked in and said, "Judge, we think we have got a settlement, but we need to put something on the record because there is a problem."

I don't know if that is what happened or not. I am just presuming that somehow Judge West didn't divine all of that. And it's not clear on the record.

It may have been something as simple as as the group walked back in, someone may have heard, and I may not have — I mean someone may have said to Judge West, "There is something you need to put on the record about this settlement" or whatever.

I don't recall the specifics of that. I just can tell from reading it that he had some knowledge before he started back up, because he said, "There is something we need to put on the record here. Mr. Schulcz needs to say something." He said something like that.

Q Did you have any discussions with Mr. Conger between the time that Mr. Condren made the statement regarding Mr.

Conger's authority and when you went before the Judge on the record?

A Yes. I think it was him walking past me in the hallway as we walked back into the chambers. And I asked [20] him if what Condren had said was true, and he said, "Yes."

Q I assume you relayed first what Condren had told you?

A Yeah. I don't remember how I said it.

Q But Mr. Conger wasn't privy to those discussions, was he?

A I don't remember. I mean it was a big hallway, and I don't remember whether he heard what Chris Condren said. I don't think he was standing there.

Q You said that when Mr. Conger was walking back. Was it to the chambers or from the chambers?

A To. I remember him passing me in the hallway, and there was a matter of a few seconds of a communication. I remember the fact that he wasn't standing still. That's all I remember is walking.

Q Do you recall whether that was immediately prior to all of you going in and going on the record?

A That is what I recall it being.

Q Did you happen to speak with anybody else between that period of time after the discussion with Mr. Condren?

Appendix K

A I don't know. It was a long time out in the hallway, and we talked to a lot of people about a lot of different things.

I think the NCAA basketball tournament was foremost on most of our minds.

* * *

APPENDIX L — CAPTIONED BRIEF/MOTION RELATIVE TO PARTIAL SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED OCTOBER 12, 1990

CIV-86-1401-W

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROYAL N. HARDAGE, et al.,

Defendants.

ADVANCE CHEMICAL COMPANY, et al,

Hardage Steering Committee Defendants and Third-Party Plaintiffs,

v.

ABCO, INC., ET AL.,

Third-Party Defendants and Fourth-Party Plaintiffs,

v.

A.C. POWELL D/B/A POWELL SANITATION, et al.,

Fourth-Party Defendants.

Appendix L

OPENING BRIEF IN SUPPORT OF THE *DE MINIMIS* SETTLORS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST THIRD-PARTY PLAINTIFFS, THE HARDAGE STEERING COMMITTEE

J. William Conger
Ross A. Plourde
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HARTZOG CONGER CASON & HARGIS
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(405) 235-7000

ATTORNEYS FOR THIRD PARTY
DEFENDANTS' LIAISON GROUP

October 12, 1990

APPENDIX M — APPLICATION OF O'BRIEN, JONES-BLAIR AND AKZO TO FILE OVERSIZED BRIEF FILED OCTOBER 15, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-1401-P

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROYAL N. HARDAGE, et. al.,

Defendants.

ADVANCE CHEMICAL COMPANY, et. al.,

Hardage Steering Committee
Defendants and Third-Party
Plaintiffs,

v.

ABCO, INC., et. al.,

Third-Party Defendants.

APPLICATION OF O'BRIEN, JONES-BLAIR, AND AKZO TO FILE OVERSIZED BRIEF

De Minimis Settlors and Third-Party Defendants, The O'Brien Corporation, ("O'Brien"), The Jones-Blair Co. ("Jones-Blair"), and Akzo Coatings, Inc. ("Akzo") respectfully request leave of Court to file a brief in excess of 25 pages in support of

Appendix M

their Motion for Partial Summary Judgment pursuant to Local District Court Rules No. 13(C) and 14(A). In support of this request, O'Brien, Jones-Blair and Akzo would state that their brief in support of their Motion for Reconsideration of the Court's ruling on September 22, 1989 and Dismissal of the HSC's cost recovery claim. . . .

APPENDIX N — DEPOSITION OF PATRICIA HOULE FOR O'BRIEN CORP. (ADMITTED IN LIEU OF DIRECT EXAMINATION)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

C-86-1401-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, et. al.,

Defendants,

ADVANCE CHEMICAL COMPANY, et. al.,

Hardage Steering Committee
Defendants and Third-Party
Plaintiffs,

ABCO, INC., et. al.,

Third-Party Defendants.

* * * * * *

DEPOSITION OF PATRICIA HOULE
TAKEN ON BEHALF OF
THE HARDAGE STEERING COMMITTEE
ON SEPTEMBER 24, 1993
IN OKLAHOMA CITY, OKLAHOMA

* * * * * *

Appendix N

APPEARANCES

For the Hardage Steering	Mr. Robert L. Roark McKinney, Stringer & Webster City Center Building Main and Broadway Oklahoma City, Oklahoma 73102
For Jones Blair Company and O'Brien Corporation:	Mr. Mitch Blackburn Hastie and Kirschner 3000 First Oklahoma Tower 210 W. Park Avenue Oklahoma City, Oklahoma 73102 and Mr. Arthur A. Schulcz, Sr. The Harker Firm 5301 Wisconsin Ave., N.W. Washington, D.C. 20015
Reported By:	Vicki Maltsberger, CSR, CP, CM

* * *

[45] going to do?

A I don't recall. I don't recall. My recollection is that I told him to proceed.

Q Proceed how?

A That we were not going to settle. And that if Cook Paint — even if Cook Paint dropped out, we were prepared to not settle.

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Q When did you gave him those instructions?

A That morning.

Q In that same telephone call?

A I believe it was the same telephone call. I don't have a memory of talking to anybody else about it.

Q So you did not confer with Mr. Allen or Mr. Crowley again?

A To my knowledge, no.

Q So you agreed to follow his recommendation on Friday the 22nd; correct?

A Correct.

Q And when he calls back on Monday and urges you to do something different, you agreed to follow his new recommendation?

A Yes

Q Did you have any other conversations with him that day?

A Yes.

* * *

(2)

Supreme Court, U.S.
FILED
OCT 30 1995
CLERK

No. 95-515

In The

Supreme Court of the United States

October Term, 1995

THE JONES-BLAIR CO. and THE O'BRIEN CORPORATION,

Petitioners,

vs.

THE HARDAGE STEERING COMMITTEE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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13pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the district court acted within its discretion, and did not clearly err, when it made factual findings, based on disputed evidence, that Petitioners had entered into enforceable settlements with Respondent.

II. Whether the district court acted within its discretion, and did not clearly err, when it denied Petitioners' motion for recusal, based on its determination that Petitioners had failed to show that a reasonable person, knowing all relevant facts, would harbor doubts about the judge's impartiality.

LIST OF PARTIES

Petitioners have incorrectly identified the individual parties comprising the Respondent, Hardage Steering Committee ("HSC"), by including several named Defendants who are not members of this unincorporated association of potentially responsible parties at the Hardage Superfund Site. The following list shows each member company and its related entities as required by Sup. Ct. R. 26.1. As authorized by the court clerk, this list includes parent companies and subsidiaries which are publicly traded and incorporated in the United States. A listing of related companies which are not publicly traded, or which are incorporated outside the United States, will be made available as directed, if necessary.

HARDAGE STEERING COMMITTEE PARTIES AND LIST OF NON-WHOLLY OWNED SUSIDIARIES

HSC Member:	Parent or Non-Wholly-Owned Subsidiary:
Advance Chemical Distribution, Inc.	
AlliedSignal Inc.	
American Telephone & Telegraph Company	AT&T Capital Corporation AT&T Credit Corporation NCR Corporation
Ashland Oil, Inc.	Ashland, Inc. A. B. & H. Processing, Inc. ACS Coal Sales Company, Inc. AECOM Technoloy Corporation Allegheny Land Company Allegheny Land Company No. 2

Ashland Oil, Inc. (Continued)

American Science & Engineering Company
Apogee Coal Co.
Arch Coal Sales Company, Inc.
Arch International, Inc.
Arch Mineral Corporation
Arch of Wyoming, Inc.
Architectural Interiors, Inc.
Ark Land Company
Ashland Coal Sales (Ohio), Inc.
Ashland Coal, Inc.
Ashland Terminal, Inc.
Associated Design Planning & Art, Inc.
ATC Architecture, Inc.
ATC Engineering Consultants, Inc.
ATC Engineering, Inc.
ATC Services, Inc.
Bebe Coal Corporation
Big Sandy Terminal, Inc.
Cardon-Southwest Co.
Catenary Coal Company
Catenary Coal Holdings, Inc.
Coal-Mac, Inc.
Coalstream Pipeline Company, Inc.
Consoer Townsend Harris International, Inc.
Consoer, Townsend & Associates of Michigan, Inc.
Consoer Townsend & Associates of Ohio, Inc.
Consoer Townsend & Associates, Inc.

Ashland Oil, Inc. (Continued)

Cumberland River Coal Company
Dal-Tex Coal Corporation
Daniel, Mahn Johnson & Mendenhall
DMJM
DMJM Agrisystems
DMJM Architects & Engineers, Inc.
DMJM Architects P.C.
DMJM Arizona, Inc.
DMJM De Lationamerica Y El Caribe
DMJM International
DMJM-Phillips, Reister, Haley, Inc.
DMJM/CD
DMJM, Inc.
DMJM, P.C.
Drennen Tipple Corporation
East West Energy Company
Energy Development Co.
Filbeth Enterprises, Inc.
Frederic R. Harris Engineering Corporation
Frederic R. Harris, Inc.
Global Consultants, Inc.
Gravcap, Inc.
Great Lakes Coal & Dock
GSAS Architects Planners, Inc.
Hobet Mining, Inc.
Holmes & Narver Constructors, Inc.
Holmes & Narver Continental, Inc.
Holmes & Narver International, Inc.
Holmes & Narver Services, Inc.
Holmes & Narver, Inc.

Ashland Oil, Inc. (Continued)

Julian Tipple, Inc.
LA Grange Oil Terminal Company
Locap Inc.
Logicomp Corporation
Lone Mountain Processing, Inc.
Loop Inc.
Melamine Chemicals, Inc.
Mexico Engineering & Services, Inc.
Mingo Logan Coal Company
Minnesota Pipe Line Company
Mountain Gem Land No. 2, Inc.
Mountain Gem Land, Inc.
Mountain Mining, Inc.
Mountaineer Land Company
Mountaineer Land Company No. 2
Old Hickory Coal Company
P.C. Holding Inc.
P & D Technololgies, Inc.
R&H Service and Supply Co.
Real Estate Resources, a DMJM Affiliate
Resource Sciences Corporation, THE
Saarcar Coal, Inc.
Servco, Inc.
Sharples Coal Corporation
South Point Ethanol
Sunven Partners Limited Partnership
Technical Management Services, Inc.
Technical Resources, Inc.

Ashland Oil, Inc. (Continued)	
	Tecumseh Pipe Line Company
	THSI Contractors, Inc.
	Tri State Terminals, Inc.
	Uhl & Lopez, Inc.
	United States Coal Company
	Vosbeck/DMJM Architects & Engineers, Inc.
	Williams Brothers Engineering Venezuela, Inc.
	701 Associates Limited Partnership
Atlantic Richfield Company	Alyeska Pipeline Service Company
	Arco Chemical Company
	Badger Pipeline Company
	Colonial Pipeline Company
	Cook Inlet Pipe Line Company
	Dixie Pipeline Company
	East Heidelberg Salt Water Disposal Co.
	East Texas Salt Water Disposal Co.
	Kuparuk Transportation Capital Corp.
	Kuparuk Transportation Company
	Logan Aluminum Inc.
	Lyondell Petrochemical Company
	Olympic Pipe Line Company
	Platte Pipe Line Company
	Prince William Sound Oil Spill Response Corporation
	Tecumseh Pipe Line Company
	Texas-New Mexico Pipe Line Company
	Vastar Resources Inc.

Borg-Warner Automotive, Inc.	
Bridgestone/Firestone,Inc. f/k/a Firestone Tire & Rubber Company	Bridgestone Corporation
Bull HN Information	Bull Data Systems, Inc.
Coltec Industries Inc.	Garlock Bearings Inc.
Exxon Corporation	
GenCorp Inc.	
Macklanburg-Duncan Company	
Maremont Corporation	Arvin Industries, Inc.
McDonnell Douglas Corporation	Finnish American International Trade, Inc. Network Information Service Co., Ltd.
Mobil Chemical Company, Inc	Mobil Oil Corporation Mobil Corporation
Nalco Chemical Company	
Oklahoma Gas and Electric Co.	
Oklahoma Publishing Company	
PPG Industries, Inc.	
Rockwell International Corporation	Rockwell Software, Inc.

Seagate Technology, Inc. (successor In Interest to Magnetic Peripherals, Inc.)	
Texaco Refining and Marketing, Inc.	Texaco, Inc. StarrStaff, Inc. Texwood L.C.
Texas Instruments Incorporated UOP Inc.	
Uniroyal Goodrich Tire Company, Inc.	The Uniroyal Goodrich Tire Company
Webco Industries, Inc.	
Westinghouse Electric Corporation	Powerex, Inc. Remotec, Inc. Rocky Mount Town Centre Associates, Limited Partnership Safe Sites of Colorado L.L.C. Corporate Interiors, Inc. Knoll Europe B.V. Gregory Environmental Systems, L.P. Wb Bottling Corporation Mojave Cogeneration Company, L.P. Harbinger Edi Services, Inc. Comware Systems, Inc. Pittsburgh Baseball Jerry Thompson & Associates, Inc. Holland Manufacturing

Weyerhaeuser Company	Pacific Veneer, Ltd.
	Cedar River Paper Co.
	Mountain Tree Farm Co.
	North Pacific Paper Co. (NORPAC)
W.O.L. Corporation	

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STATUTES INVOLVED

In addition to the citations provided in Petitioners' Petition for Writ of Certiorari, Respondent has listed statutory and regulatory provisions which are involved in the merits of this case in Appendix I. These provisions will be relevant to the fact issues before this Court if it determines to exercise its discretionary jurisdiction and issue a Writ of Certiorari in this matter. Since they are only relevant to fact issues which were decided by the district court, however, they are not pertinent to the arguments contained in this Brief.

STATEMENT OF THE CASE

On June 25, 1986, the United States filed this lawsuit seeking an injunction under Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606, to compel the named defendants, including the Hardage Steering Committee ("HSC"), to implement a government-developed remedy at the Hardage Superfund site located near Criner, Oklahoma. The federal government also sought, pursuant to CERCLA Section 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A), to recover the costs it had incurred and would incur in the future to investigate and monitor conditions at the Hardage site. Jones-Blair Company ("Jones-Blair") and The O'Brien Corporation ("O'Brien") had been identified by the government as potentially responsible parties at the Hardage site, but were not named defendants in the June 25, 1986 Complaint because they had previously entered into a court approved *de minimis* settlement with the government covering its response costs.

On May 22, 1987, the HSC sued Jones-Blair and O'Brien, with more than 100 other third-party defendants, for their share of the costs the HSC incurred independently of the government to develop the Hardage site remedy ultimately selected by the

district court over the government's proposed remedy. On November 28, 1990, the district court found that Jones-Blair and O'Brien were liable under CERCLA as generators of hazardous substances at the Hardage site.[1] The district court scheduled a trial date of March 25, 1991, to determine the amount of response costs owed HSC by all remaining parties, including Jones-Blair, O'Brien and additional third-party defendant Cook Paint and Varnish Company ("Cook Paint"), who was not a *de minimis* settler with the government.

Prior to the scheduled trial date of March 25, 1991, the HSC presented an offer of settlement to the *de minimis* third-party defendants, including Jones-Blair and O'Brien. The proposed settlement required each *de minimis* third-party defendant to pay the HSC one dollar per gallon of waste contributed to the Hardage site, less certain credits. This amounted to $24,825 for Jones-Blair, and $43,022 for O'Brien. This offer of settlement remained pending until it was accepted and put into effect as described below.

On March 22, 1991, Petitioners' counsel of record, Timothy L. Harker, who also represented Cook Paint, sent a letter to J. William Conger, court-appointed liaison counsel for the third-party defendants. The letter informed Conger that Jones-Blair and O'Brien would settle with the HSC for its $1 per gallon offer if Cook Paint also settled, and that Cook Paint would settle or not based on the decision of its insurance counsel who would be present in court on March 25, 1991. Harker's letter confirmed that Conger would apprise the HSC of Cook Paint's, Jones-Blair's and O'Brien's positions in time for settlements to occur to avoid trial. [Petition, App. G, 38a-39a]. Copies of this letter

1. In spite of having paid substantial sums to settle the government's response cost claims under the *de minimis* Consent Decree, Jones-Blair and O'Brien both denied they were liable parties under CERCLA, thereby forcing the HSC to establish their liability by summary judgment.

were sent to client representatives of each of the four companies identified therein whom Harker represented. *Id.* [2]

On Monday, March 25, 1991, the district court ordered a two-day continuance of the previously-scheduled trial to afford the several remaining parties (more than those involved here) an additional opportunity to settle their respective claims. By Wednesday morning March 27, 1991, all other parties except Cook Paint, Jones-Blair and O'Brien had reached settlements or stipulations with the HSC which would avoid a long, complex, costly trial. Cook Paint and the HSC asked for and were granted additional time that morning to attempt to settle the HSC's claims.

During these settlement discussions, the HSC made it clear that due to the cost of trial it would settle with Cook Paint for a reduced amount only if Jones-Blair and O'Brien also settled by accepting the HSC's outstanding offer of one dollar per gallon, since only in this way could HSC avoid the expense of a complex trial. Based on the Harker March 22, 1991 letter, which Conger and Chris Condren, local counsel for Cook Paint, had a copy of, Cook Paint reached agreement with the HSC and thereby committed Jones-Blair and O'Brien to accept the HSC's *de minimis* settlement offer. [App. III, 23a-24a].

Upon being informed of the facts leading up to the settlements between Cook Paint Jones-Blair, O'Brien and the HSC, the district court judge concluded that enforceable agreements had been reached, and called counsel for the parties into his chambers for an on-the-record discussion. Judge West read into the record the contents of the Harker March 22, 1991

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2. Harker also represented Reliance Universal, a *de minimis* party who also accepted HSC's one dollar per gallon offer, and is not involved in this dispute.

letter, then asked Conger, liaison counsel for Cook Paint, Jones-Blair and O'Brien, to state his "understanding of the terms and conditions having been complied with." [Petition, App. F, 33a]. Conger's response was as follows:

> Your honor, in light of the statement by Ms. Bunn on behalf of Cook Paint, it seems to me that all of the protocols and requirements set forth in Mr. Harker's letter are performed and therefore, that the settlement should go through on behalf of O'Brien and Jones-Blair, pursuant to the instructions of this letter.

Id. at 33a-34a. Condren, counsel for Cook Paint, stated that his client believed it had settled the HSC's claims against it and was avoiding the costs associated with a CERCLA response cost trial. *Id.* at 34a. At this point, Judge West stated:

> The Court agrees with that and has advised Mr. Schulcz that it intends to enforce the settlement with regard to Jones-Blair and other clients in accordance with that. But I also want to allow him an opportunity to make a statement into the record.

Id. After Schulcz stated his position, Judge West noted:

> All right. As the Court has previously announced, it's my opinion that the terms and protocols and conditions have been complied with; that Mr. Conger is authorized to settle the case on that basis.
>
> The Court will enforce the settlement in that regard.

> In addition to that, there is a practical matter that I feel obligated to state. The Court is not about to undertake a trial of this magnitude and size on behalf of two diminimis (sic) parties. Costs would very quickly exceed any amount in controversy as between them and certainly exceed any differences in their positions now from the time that was stated.

Id. at 35a.

Jones-Blair and O'Brien appealed the district court's enforcement of their settlements with the HSC to the Tenth Circuit Court of Appeals. In *United States v. Hardage*, 982 F.2d 1491 (10th Cir. 1993), the appellate court reiterated the district court's inherent power to enforce settlement agreements between litigants but concluded the district court should have conducted a full blown evidentiary hearing on the events leading up to the settlement since Jones-Blair and O'Brien were disputing the facts. The Court of Appeals remanded the case to the district court for an evidentiary hearing "to resolve the dispute of whether [Jones-Blair and O'Brien] and HSC validly entered into a settlement agreement." *Hardage*, 982 F.2d at 1496-97. In complying with the remand, the district court was assigned a task for which it is inherently better-suited than any appellate court, including this Honorable Court — namely, the weighing of conflicting evidence to determine fact issues presented to it for resolution.

Prior to the hearing conducted by the trial court on remand, Petitioners filed a motion seeking recusal by the trial judge on grounds that his impartiality was questionable, based on his prior ruling in 1991 regarding the settlement, as well as earlier rulings in the case in which he found against Jones-Blair's and O'Brien's attempt to claim defenses based on their *de minimis* settlement

with the government. [App. IV, 33a-36a.] After being fully briefed, the court denied this motion under the applicable standards. [Petition, App. A, 1a-2a].

At the evidentiary hearing conducted on remand on December 21, 1993, evidence was presented to determine the following key facts:

1. The HSC presented an offer to Jones-Blair and O'Brien to settle its respective claims against them prior to March 22, 1991. [App. II, Roark Deposition, 5a ("There was a *de minimis* offer that had been on the table for months and months."); App. III, Harker testimony, 26a-27a ("there was a global settlement offer on the street from the Hardage Steering Committee for the *de minimis* parties of a dollar a gallon . . .")].

2. The Harker March 22, 1991 letter laid out the terms by which Jones-Blair and O'Brien would accept the HSC's offer, *i.e.*, they would settle if and when Cook Paint settled with the HSC. [App. III, Conger testimony, 8a-10a; Condren testimony, 22a-23a; Harker testimony 27a].

3. Neither Harker, as the principal attorney representing Jones-Blair and O'Brien, nor Schulcz, as Harker's associate at the scene of settlement negotiations, ever informed Conger, Condren or the HSC of any change in settlement position which departed from the terms of the Harker March 22, 1991 letter, until the morning of trial on March 27, 1991. [App. III, Conger testimony, 11a-12a, 13a-15a, 16a-17a; Condren testimony, 20a-21a; Harker testimony, 28a-31a].

4. The settlements between the HSC and Jones-Blair and O'Brien became effective when Cook Paint settled on March 27, 1991, before Conger, Condren or the HSC knew of any change in settlement position. [App. III, Conger testimony, 17a, 18a-19a; Condren testimony, 23a-24a, 25a].

5. Cook Paint relied on the position stated in the Harker March 22, 1991 letter when it settled with the HSC on the morning of March 27, 1991. [App. III, Condren testimony, 26a].

After hearing all of the evidence offered by Jones-Blair, O'Brien and the HSC, judging the credibility and demeanor of the witnesses, reviewing the relevant exhibits offered by all parties, and studying the briefs submitted by both sides, Judge West entered detailed findings of fact and conclusions of law in which he found, *inter alia*:

* * *

> 3. Indeed, the evidence presented at the hearing confirms and strengthens the Court's opinion that the letter of March 22, 1991, authorized the settlements that the court enforced. Neither the authority given to Conger nor Jones-Blair's or O'Brien's offer of settlement as outlined in the letter was withdrawn, countermanded or modified by anyone prior to the time the condition in the letter — Cook Paint's settlement with the HSC — had occurred. And, once Cook Paint settled with the HSC, settlements between the HSC and Jones-Blair and O'Brien were effected.

[Petition, App. B, 10a].

In its Order and Judgment filed on May 5, 1995, the Tenth Circuit Court of Appeals affirmed the district court's judgment finding the parties entered into a settlement agreement and enforcing the settlements between the parties. The Court of Appeals also concluded the district court did not abuse its

discretion in denying Jones-Blair's and O'Brien's motion to recuse. [Petition, App. C]. Petitioners' subsequent petition for rehearing and suggestion for rehearing en banc was denied on June 28, 1995. [Petition, App. D].

SUMMARY OF ARGUMENT

The controversies presented by Jones-Blair's and O'Brien's Petition are based solely on factual findings of the district court, and are not issues which warrant this Court's discretionary jurisdiction. The May 5, 1995 Order and Judgment of the United States Court of Appeals for the Tenth Circuit [Petition, App. C, 12a-18a] clearly states that the district court *did not commit reversible error* when it (1) concluded that the parties entered into a settlement agreement and (2) enforced the settlement agreement. Additionally, the appellate court concluded that the district court *did not abuse its discretion* by denying Jones-Blair's and O'Brien's motion to recuse.

These fact issue determinations, which were squarely within the province of the trial judge in his inherently advantageous position to evaluate the credibility of the witnesses and weigh the testimony and other evidence presented by the parties, and which were affirmed at the appellate court level, are rarely, if ever, appropriate for this Court's review. *See* Sup. Ct. R. 10.[3] This is, simply put, a plain, ordinary, vanilla contract dispute involving disputed facts. There are no federal constitutional or statutory

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3. The August 1, 1995 amendment to this Court's Rule 10, which became effective on October 2, 1995, reflects the long-standing practice of this Court in determining whether to exercise its discretionary jurisdiction.

* * *

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

interests involved in this case, nor any other "compelling reasons" to grant jurisdiction.

Jones-Blair's and O'Brien's Petition for Writ of Certiorari is a transparent attempt to transform Petitioners' dissatisfaction with fact-intensive decisions, fairly reached and affirmed in the courts below, into the "creation of a new federal law of settlement" which "negates state law and constitutional due process." [Petition at i]. Reference to Sup. Ct. R. 10, Considerations Governing Review on Writ of Certiorari, is noticeably absent from Jones-Blair's and O'Brien's Petition. Instead, in a last ditch effort to gain the attention of the highest court in the land, they contend they were denied "their day in court" despite the fact they have spent the last four-and-a-half *years* in continuous, litigious attempts to undo the district court's decision to enforce their combined settlement — a settlement involving only $68,000.

They further seek to elevate the level of importance of this case by attempting to raise issues of fairness and attacking the impartiality of the trial judge. Placed in its proper context, Petitioners' argument is predicated on their dissatisfaction with the way the trial judge chose to manage his docket, the exercise of his discretion on the merits of the claims which Jones-Blair and O'Brien repeatedly raised in the trial court, and ultimately on the contention he could not appear fair because prior to remand he had ruled in favor of the HSC on the settlement agreement issue.

It is obvious that the district judge did not abuse his discretion by denying Jones-Blair's and O'Brien's motion to recuse. The Court of Appeals had the full benefit of all the arguments and case authority which Jones-Blair and O'Brien were able to muster in support of their contention that Judge West's refusal to step down from this case was an abuse of his discretion. The conclusion reached by the appellate court, that

Judge West *did not abuse his discretion* by denying Jones-Blair's and O'Brien's motion to recuse, is squarely in line with this Court's holding and reasoning concerning the extra-judicial source doctrine in *Liteky v. United States*, __ U.S.__ , 114 S. Ct. 1147 (1994).

Similarly, on the issue of enforcement of the settlement agreement, it is obvious from the evidence presented to the district court that it did not clearly err. At the evidentiary hearing conducted on December 21, 1993, the live testimony of four witnesses, including Petitioners' counsel of record and one of his associates, and the deposition testimony of four other witnesses, all subject to vigorous cross-examination, were part of the record upon which the district court based its decision that Jones-Blair and O'Brien reached valid settlements with the HSC pursuant to Oklahoma contract law. The appellate court, in affirming the conclusions reached by the district court, likewise had the full benefit of all the arguments and case authority which Jones-Blair and O'Brien were able to muster in support of their contention that enforceable settlements had not been reached.

In their original brief to the Tenth Circuit, Jones-Blair and O'Brien *made no contention* whatsoever that the district court improperly created "a new federal settlement rule." Rather, they repeatedly argued only that the federal district court sitting in Oklahoma failed to correctly interpret and apply Oklahoma law to the facts. The new twist Petitioners give this case, *i.e.*, creation of a "new federal rule of settlement," was made only after the Tenth Circuit affirmed the district court's decision. Nowhere in the Tenth Circuit's opinion, however, nor for that matter the district court's judgment, did either court even allude to, implicitly or explicitly, a "new *federal* rule of settlement". The conclusions reached by the appellate court, that Judge West *did not commit reversible error* by (1) concluding that the parties

entered into a settlement agreement and (2) enforcing that settlement agreement [Petition, App. C, 18a], should be accorded the finality they deserve.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' QUESTIONS PRESENTED FOR REVIEW MISSTATE THE ISSUES ACTUALLY PRESENTED TO AND DECIDED BY THE COURT OF APPEALS AND DISTRICT COURT.

Disregarding the directive of Sup. Ct. R. 14.1(a) that questions presented for review be "short and concise" and not "argumentative or repetitious," Petitioners have devoted the full measure of the page allotted to them to present three lengthy, argumentative questions which assume facts not supported by the record and which were not even decided by the appellate court. This Court should not be enticed by these misstatements of the issues presented below to exercise its discretionary jurisdiction.

Stripped of their improper components, Petitioners' "questions" present to this Court nothing more than a request for review of (i) fact issue determinations wholly within the purview of the district judge and (ii) a determination wholly within the sound discretion of the district judge concerning recusal, both of which have already been reviewed properly by the Court of Appeals. It is clear that these are not proper issues for the exercise of this Court's discretionary jurisdiction, despite Petitioners' overreaching attempts to cast the "questions presented" as presenting weighty issues worthy of yet a third level of consideration. In cases such as this, it is appropriate for this Court to decline to exercise its jurisdiction. *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 106 S. Ct. 507, 513, n. 10, 88

L. Ed. 2d 523 (1985) ("In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable."); *Phillips v. Joint Legislative Committee*, 637 F.2d 1014 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 971, *reh. denied*, 457 U.S. 1140, *reh. denied*, 458 U.S. 1116 (recusal is committed to district judge's sound discretion, thereby limiting scope of review).

Petitioners' first "question" contains superfluous and incorrect statements which ignore the factual sequence of events that occurred on the record before the district judge on the morning of March 27, 1991. It is not correct, as Petitioners assert, that no party asked Judge West to determine that Petitioners had settled with the HSC. It is clear from the transcript of proceedings that Conger, as liaison counsel for the third-party defendants, including Jones-Blair and O'Brien, stated that their settlements with the HSC should be enforced. [Petition, App. F, 33a-34a]. Counsel for Cook Paint also urged that Cook Paint's settlement with the HSC bound Jones-Blair and O'Brien to the settlement terms of the Harker March 22, 1991 letter. [App. III, Condren testimony, 26a]. As discussed further below, it is also apparent from a cursory reading of the transcript that Petitioners have taken out of context Judge West's comments about the impracticalities of a lengthy, complex trial. [Petition, App. F, 34a-35a].

More importantly, this "question" as phrased by Petitioners does not even state a legally cognizable issue which this Court could address if it chose to exercise its discretionary jurisdiction. The issue which was presented to the appellate court, which it properly decided [Petition, App. C, 18a], and which the HSC contends is the true "question" Petitioners should have presented to this Court, is whether the district court *abused its discretion* (not whether the trial court properly reflected the "appearance of

justice") in denying Jones-Blair's and O'Brien's motion for recusal.

Petitioners' second and third "questions" are likewise improper. Having failed to convince the courts below they were wrong in the way they applied Oklahoma's law of contracts to the facts of this case, Jones-Blair and O'Brien have resorted to the contention that the district and appellate courts have totally disregarded Oklahoma law, and have fashioned "a new federal law of settlement" which impermissibly "negates state law and constitutional due process." [Petition at i].

The second and third "questions" also contain incorrect statements which ignore the sequence of events that occurred on the record. The second "question" posed by Petitioners contains no less than four subparts which are nothing more than disputed fact issues determined by the trial court. As shown in Respondent's Statement of the Case, *supra,* three of these fact issues as phrased by Petitioners are simply wrong. It is not correct, as Petitioners assert, that Conger was "the one person" authorized to settle on Petitioners' behalf. Indeed, Harker's own letter gave Cook Paint a determinative role in the settlement negotiations. [Petition, App. G, 38a]. It is also incorrect to state there was no evidence to support the district court's finding that the criteria for contract formation had been met, or that the district court "ignored" Petitioners' right to rescind or revoke their settlements. As demonstrated herein, there was, in fact, sufficient evidence from which the district court could determine that an enforceable agreement had been reached under Oklahoma law, which was not and could not be rescinded or revoked by Petitioners' counsel. The fact Petitioners disagree with the district court's factual determinations does not entitle them to assert here that there was no evidence to support their position.

II.

NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BY THE PETITION FOR WRIT OF CERTIORARI.

A. The District Court's Denial of Petitioners' Motion to Recuse Did Not Constitute an Abuse of Its Discretion.

At the on-the-record meeting in Judge West's chambers on March 27, 1991, the district judge explicitly stated that the "terms and protocols" of the conditional acceptance stated in the Harker 3/22/91 letter had been met, thereby resulting in settlements between Jones-Blair and O'Brien and the HSC. [Petition, App. F, 34a, 35a]. It was only *after* Judge West had twice stated this basis for his decision to enforce the settlements (once on the record, and once prior thereto), that he made the practical observation which has become the centerpiece of Jones-Blair's and O'Brien's Petition. Judge West's comments about the impracticality of a trial were carefully prefaced with the statement that places his remarks in their proper context: *"In addition to* that, there is a *practical matter* that I feel obligated to state." [Petition, App. F, 35a]. This judicial comment obviously did not state the determinative basis for the district court's decision to enforce the settlements between Petitioners and the HSC.[4]

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4. The additional grounds for their appeal on the recusal issue (rulings on various motions) are equally unpersuasive. As part of their argument in support of recusal [Petition at 10] Jones-Blair and O'Brien have asserted, incorrectly, that part of the denial of their "day in court" occurred as a result of the district court's refusal to recognize the CERCLA "contribution protection" as a shield from the HSC's independent response cost claims. Jones-Blair and O'Brien misinterpret, if not misstate, the Tenth Circuit's decision in *United States v. Colorado and Eastern Ry. Co.*, 50 F.3d 1530 (10th Cir. 1994) which they cite in support of their recusal argument in footnote 1 on page 10 of their Petition. In *Colorado and Eastern Ry. Co.*, the court clearly recognizes that a

(Cont'd)

This Court's recent, definitive pronouncements on the issue of recusal conclusively support the district court's denial of Petitioners' motion. Despite the fact they cite *Liteky v. United States*, __ U.S. __, 114 S. Ct. 1147 (1994) in their Petition [Petition at 9, 12], Jones-Blair and O'Brien have studiously ignored its application of the "extrajudicial source" doctrine to the federal recusal statute, 28 U.S.C. § 455. The various grounds Petitioners have offered to support their contention that Judge West abused his discretion in denying their motion to recuse are strikingly similar to those which were rejected by this Court in Liteky: "judicial rulings, routine trial administration efforts, and ordinary admonishments (whether or not legally supportable) to counsel . . ." *Liteky*, 114 S. Ct. at 1158. As the Court noted:

> All [these grounds for recusal] occurred in the course of judicial proceedings, and neither (1) relied upon knowledge acquired outside such proceedings nor (2) displayed deep-seated and unequivocal antagonism that would render fair judgment impossible.

Id. At best, Petitioners' arguments concerning the basis for the district court's rulings are proper grounds for appeal on the merits, not recusal. If, as they contend, no enforceable

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(Cont'd)

CERCLA responsible party who has settled its liability to the federal government is *only* shielded by contribution protection for "matters addressed" within the settlement. *Id.*, 50 F.3d at 1537. The settling party is not, however, shielded from the independent response costs incurred by another responsible party. *Id.* at 1539. This is precisely the law of the case in *Hardage*, and the very reason why the trial court's consistent denial of Jones-Blair's and O'Brien's repeated attempts to reassert their contribution protection defense was correct. In any event, this appeal by Jones-Blair and O'Brien does not involve the issue of contribution protection, nor was it ever ripe for decision by the Tenth Circuit in the *Hardage* case.

settlements were reached with the HSC on the morning of March 27, 1991, their proper avenue for redress is appeal from the adverse ruling. *See Liteky,* 114 S. Ct. at 1157 ("Almost invariably, [judicial rulings] are proper grounds for appeal, not for recusal."). There is, therefore, no basis for reviewing the Court of Appeals' decision on this issue.

B. The District Court Did Not Clearly Err When It Enforced the Settlement Agreements Between Petitioners and the HSC.

As explained in the Statement of the Case, *supra* at 6-7, the district court had before it sufficient evidence on which to base its decision that Petitioners and the HSC had entered into enforceable settlements pursuant to Oklahoma law. When the Court of Appeals remanded this case to the district court for the purpose of conducting the evidentiary hearing which was held on December 21, 1993, it informed the parties that its review of the district court's decision of whether an enforceable settlement had occurred would be based on an abuse of discretion standard. *United States v. Hardage,* 982 F.2d 1491, 1495 (10th Cir. 1993). Subsequently, the appellate court specifically indicated in its opinion affirming the district court's decision that it reviewed the district court's conclusions of law de novo, and its findings of fact for clear error. [Petition, App. C, 17a-18a].

The standard of review employed by the Court of Appeals is consistent with this Court's guidance in *Salve Regina College v. Russell,* 499 U.S. 225 (1991). In that case, the Court held that the trial court's findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Deferential review of mixed questions of law and fact is warranted when the district court is better positioned than the appellate court to decide the issue in question or that probing legal scrutiny will not

contribute to the clarity of legal doctrine. *Id.* at 233 (citations omitted).

In this case, the district court was able to judge the credibility of the witnesses and carefully weigh the evidence presented to it, exercising its proper function in a way which the Court of Appeals or this Court is inherently unable to do on appeal. In *Salve Regina,* the district court was faced with the purely legal issue of whether the commercial doctrine of substantial performance should apply in an academic setting under Rhode Island law. *Id.* at 229. Since there was no fact question, or even a mixed question of fact and law, to be reviewed, this Court was not reluctant to examine the lower court's ruling. Here, however, only disputed fact questions are involved. Obviously, the Court of Appeals did not "forget" this Court's guidance in *Salve Regina,* as Petitioners contend. [Petition at 15] They have failed to cite any authority which establishes a standard of review other than abuse of discretion, or clear error, when a district court has enforced a settlement.

When this matter was remanded by the Court of Appeals to the district court, it was for the purpose of determining whether, as a matter of fact, the HSC and Petitioners entered into a valid settlement agreement. *Hardage,* 982 F.2d at 1496-97. Necessarily included in this determination were questions such as:

1. What was the interpretation of the Harker March 22, 1991 letter by Conger and Condren?

2. What was the effect of the Harker March 22, 1991 letter as construed by Conger and Condren?

3. Did Jones-Blair's and O'Brien's counsel revoke or countermand the instructions in the Harker March 22, 1991

letter to Conger prior to a settlement being reached with the HSC?

4. Did Conger reasonably believe he had authority to facilitate a settlement with the HSC on March 27, 1991?

5. Did Conger, Condren and the HSC rely upon the authority granted by the Harker March 22, 1991 letter, and, if so, did they change their positions as a result?

6. At what point in time were agreements reached between Cook Paint and the HSC, and Jones-Blair and O'Brien and the HSC on March 27, 1991?

7. Was counsel for Jones-Blair and O'Brien legally entitled to rescind or repudiate the settlement after it was already made, and if so did he effectively do so?

8. What weight and credibility should be afforded the witnesses and other evidence presented?

Rather than recognize, as they should, that the district court simply did not believe Petitioner's evidence on these disputed fact issues, Petitioners contend the district court must have decided to create "a new federal law of settlement that negates state law." [Petition at i]. But there is clearly no reference to such a "federal law of settlement" in either the district court's judgment or the Court of Appeals' opinion. There is only a detailed analysis of conflicting evidence and the application of elementary principles of Oklahoma contract law to those facts. As hard as Petitioners might try to recast the issues in this case as involving federal questions or constitutional due process, this Court should reject that false implication. Jones-Blair's and

O'Brien's second and third "questions for review" are totally inappropriate for the exercise of the Court's discretionary jurisdiction.

CONCLUSION

Petitioners have not presented the Court with any colorable basis for exercising its discretionary jurisdiction in this matter. The "questions presented" in the Petition amount to nothing more than ill-disguised fact issues and determinations wholly within the sound discretion of the trial judge, which were properly reviewed and affirmed by the Court of Appeals. There are no important questions of federal law presented by the Petition, nor any other compelling reasons for exercising jurisdiction. For these reasons, the HSC respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX I — ADDITIONAL STATUTES INVOLVED IN THE CASE

Okla. Stat. tit. 15, § 68 (1991):

> If a prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted.

Okla. Stat. tit. 15, § 69 (1991):

> Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer, in conformity to [Section 68 of this title].

Okla. Stat. tit. 5, Ch. 1, App. 3-A, Rules of Professional Conduct:

> Rule 1.7. Conflict of Interest: General Rule
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) each client consents after consultation.

Appendix I

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

APPENDIX II — EXCERPTED DEPOSITION OF ROBERT ROARK DATED SEPTEMBER 23, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

C-86-1401-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROYAL N. HARDAGE, et. al.,

Defendants,

ADVANCE CHEMICAL COMPANY, et. al.,

Hardage Steering Comittee
Defendants and Third-Party
Plaintiffs,

ABCO, INC., et. al.,

Third-Party Defendants.

* * * * * *

DEPOSITION OF ROBERT ROARK
TAKEN ON BEHALF OF
JONES BLAIR COMPANY AND O'BRIEN CORPORATION
ON SEPTEMBER 23, 1993
IN OKLAHOMA CITY, OKLAHOMA

* * * * * *

Appendix II

APPEARANCES

For the Hardage Steering	Mr. Robert D. Tomlinson McKinney, Stringer & Webster City Center Building Main and Broadway Oklahoma City, Oklahoma 73102
For Jones Blair Company and O'Brien Corporation:	Mr. Mitch Blackburn Hastie and Kirschner 3000 First Oklahoma Tower 210 W. Park Avenue Oklahoma City, Oklahoma 73102
Reported By:	Vicki Maltsberger, CSR, CP, CM MERIT REPORTERS, INC. Suite 807, Two Leadership Sq. Oklahoma City, Oklahoma 73102 (405) 232-2804

* * *

[20] for the continuance; that we needed Monday and Tuesday to get some of those things put to bed.

So I think as of Friday the 22nd when the letter was sent, there was not a global agreement with the major defendants. At that point in time, there was definitely going to be a full-blown two- or three-week cost trial and liability trial is my recollection.

Q. Well, then, on March 22nd of '91 when the letter was sent, what were they conditionally agreeing to accept in the way of a settlement? Do you know?

Appendix II

MR. TOMLINSON: Are you asking him what they were thinking?

THE WITNESS: What who was agreeing to?

Q. (By Mr. Blackburn) Jones-Blair and O'Brien. Are you aware? Were they responding to an agreement that was on the table?

A. All right. You are getting the global — I think you are getting the global settlement confused with the the de minimis settlement.

Q. Okay.

A. There was a de minimis offer that had been on the table for months and months. And that offer on the table was basically that the de minimis parties would each pay a dollar per gallon for their volume of waste. And that they would receive against that number credit for 70 percent of [21] any sums that they may have paid the HSC while they were members of the HSC. Some of those parties had previously been members of the HSC and got out. They had paid some assessments during the time they were members.

The agreement was they would pay a dollar, less credit for 70 percent of any assessments they had paid the HSC.

Yes, that offer was a firm offer. It had been on the table. We had had some acceptances trickle in during the month prior to trial. And that had been the offer that applied to Jones-Blair and O'Brien.

* * *

APPENDIX III — EXCERPTED TRANSCRIPT OF HEARING DATED DECEMBER 21, 1993

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Docket No. C-86-1401-W

Oklahoma City, Oklahoma

December 21, 1993

UNITED STATES OF AMERICA,

Plaintiff,

V.

ROYAL N. HARDAGE, ET AL,

Defendants,

ADVANCE CHEMICAL COMPANY, ET AL.,

Hardage Steering Defendants
and Third-Party Plaintiffs,

v.

ABCO, INC., et al.,

Third-Party Defendants.

Appendix III

TRANSCRIPT OF HEARING DECEMBER 21, 1993 BEFORE THE HONORABLE LEE R. WEST UNITED STATES DISTRICT JUDGE

[2] A-P-P-E-A-R-A-N-C-E-S

Appearing for the Jones-Blair Company and The O'Brien Corporation:	Mitchell D. Blackburn Attorney at Law Oklahoma City, OK
Appearing for the Hardage Steering Committee:	Robert L. Roark Attorney at Law Oklahoma City, OK
Court Reporter	Lynn L. Hilton 3001 U.S. Courthouse Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

* * *

[Testimony of J. William Conger
Direct examination by Mr. Roark]

[14] Q. As between Mr. Harker and Mr. Schulcz, who was the more senior attorney or lead attorney in that relationship, according to your perception?

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A. My perception was that Tim Harker was.

Q. Did most of your instructions initially come from Mr. Harker in that regard?

A. Yeah, I can say that.

Q. Do you recall who initiated that phone call on the 22nd?

A. Mr. Harker did.

Q. Can you tell us briefly, as best you can recall, what the substance of the conversation was?

A. Yes. We talked about the status of the settlement negotiations and he indicated to me that Akzo — I believe I'm saying that name right — wanted to settle; that Jones-Blair and O'Brien would settle if Cook Paint settled.

During that time, in that week, Cook Paint was — which wanted to settle — was engaging in negotiations with their carrier. That was their impediment to their ability to settle.

Q. Do you recall whether or not he explained the rationale as to why Jones-Blair and O'Brien wanted to tie their fate to Cook Paint?

A. Yes.

Q. What was that?

A. Well, his position was that-if Cook Paint was not able to settle and that Cook Paint was going to proceed to trial, that [15] it was

his view that it would be appropriate for Jones-Blair and O'Brien to proceed to trial with Cook Paint. The economics would support them going forward in trial, their positions were basically the same, their legal positions.

Q. In terms of bearing the cost of going forward, as between Jones-Blair and O'Brien and Cook Paint, who was the biggest party bearing the biggest brunt of that cost?

A. Cook Paint.

Q. That conversation was followed up by a letter from Mr. Harker; is that correct?

A. That's true.

Q. I have handed you what is marked as Plaintiffs' Exhibit 1. Can you identify that for the Court, please?

A. This is the letter that I received by FAX from Mr. Harker on the 22nd.

MR. ROARK: I would offer Plaintiffs' Exhibit 1 at this time.

MR. BLACKBURN: (No response.)

THE COURT: Without objection, it will be admitted.

Q. Did you receive this by telefax the very same day you had your telephone call?

A. I believe that's right.

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Q. When you received the letter, Mr. Conger, was there any doubt in your mind about the intent or the effect of this letter?

[16] A. No.

Q. This is consistently the telephone conversation that you just described?

A. Precisely. It just confirmed what he had told me by telephone.

Q. Go to Monday, March 25th.

A. Okay.

Q. First of all, over the weekend on the 23rd or 24th, did anything occur in the way of a settlement between Cook Paint and the HSC which would make this letter become effective?

A. No.

Q. On Monday, at that point in time, were negotiations still ongoing —

A. Yes.

Q. — among several of the parties left in the case?

A. Yes.

Q. At that point, am I correct, Mr. Conger, that virtually all of the other third-party defendants and major defendants in the case had reached an agreement with the HSC, at least as of Monday — strike that, let me start that over.

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On Monday, the 25th, the parties appeared before Judge West, did they not?

A. They did.

Q. At that point in time, the Court granted a continuance for a couple of days so that some final negotiations among the HSC

* * *

[18] A. Yes, of course.

Q. You, personally, what kind of schedule and activities were you engaged in during those two days?

A. Well, we were — we had a plate full. We were working long hours. And as I say, I was constantly involved, either in preparing for trial, or working with the rest of the settlements and being kept advised of the status of those.

Q. Did you have conversations with Mr. Schulcz from time to time during the days of March 25th and March 26th?

A. Yes.

Q. Did the subject of this letter, Plaintiffs' Exhibit 1, ever come up during any conversation that you had with Mr. Schulcz on those two days?

A. Absolutely not.

Q. Do you recall any conversation with Mr. Schulcz, Mr. Conger, in which he discussed the settlement positions of Jones-

Appendix III

Blair and O'Brien and Cook Paint, such that it would constitute a change in the instructions that are contained in this Exhibit 1?

A. No, sir, I did not.

Q. You testified with certainty that no such conversation occurred?

A. Right.

Q. How can you be so sure that that did not occur?

A. Well, I mean I think that if this letter had been [19] repudiated in any way or I had been led to believe that it was being repudiated, I would recall that and I would have done something about it.

Q. Would that have been an important development to you in getting ready for trial on those two days such that you would have reacted to it?

A. Sure, it would.

Q. As a practical matter, it came down to the fact that actually only these three parties were left; is that true?

A. That's right.

Q. So of all the parties, were you interested mostly in the positions of these three parties at that point in time?

A. Yes, they were the only ones left.

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Q. Tell us what Mr. Chris Condren's role was from your side of the table during those two days? First of all, he is an attorney here in Oklahoma City, correct?

A. Yes, he is.

Q. Whom did he represent?

A. He represented Cook Paint, the carrier had tendered the defense and that was his capacity.

Q. Did he also have a role in the third-party liaison executive committee that more or less managed the side of your litigation?

A. He was the chairman of our committee.

Q. He was very active in the case on behalf of his clients; [20] is that a fair statement?

A. And on behalf of all other third parties in that capacity, yes.

Q. Did you advise Mr. Condren of the existence of this letter, Plaintiffs' Exhibit 1, sometime on Monday, the 25th or Tuesday, the 26th?

A. Yes, I did. I don't recall specifically when I advised him, but it was during that week.

Q. You did discuss the letter with him, tell him what it said?

A. Yes. He knew, as did everyone, what the position was. I had communicated the position, as I understood it, that if Cook Paint settles the case, Jones-Blair and O'Brien would settle.

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Q. Did you have a conversation with Mr. Tim Harker on Tuesday March 26th?

A. Yes, I did.

Q. Do you recall who initiated that phone call?

A. I believe he called me Tuesday evening.

Q. Do you recall what the purpose of his call was?

A. I think that he was calling to inquire just about, again, the general status and what we were doing relative to the trial that we thought was going to start the next morning and general information, just two lawyers talking.

Q. During the course of that conversation, Mr. Conger, did the subject of this letter, Plaintiffs' Exhibit 1, ever come [21] up?

A. No, it did not.

Q. Did Mr. Harker ever say anything to you during that conversation about any change in position in the settlement positions of his three clients?

A. No, he did not.

Q. Was there any discussion at all about any settlement at that point?

A. No.

Q. On March 25th and March 26th, did you receive any type of

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written communications from Mr. Harker's office with respect to Plaintiffs' Exhibit 1, changing the effect or instructions in Exhibit 1?

A. No, sir.

Q. Did Mr. Schulcz hand you any handwritten notes that would address Plaintiffs' Exhibit 1?

A. No, he did not.

Q. On Wednesday March 27th, the parties appeared before Judge West for trial of what was left of the case; is that correct?

A. True.

Q. You were present?

A. I was present.

Q. So, I believe, was Mr. Schulcz?

A. Mr. Schulcz was here, yes.

Q. Mr. Condren was also present on behalf of Cook Paint; is

* * *

[Cross examination by Mr. Blackburn]

* * *

[46] Q. So it was as a result of a conversation on Monday that you

believed he didn't know of the letter on Monday. I apologize. But you heard Mr. Schulcz making this dispute, correct?

A. Yes.

Q. You didn't go and say, "Art, there is this letter, it exists," you didn't, right?

A. He knew the letter existed by then.

Q. You believed that Mr. Schulcz was merely mistaken when he said that the letter had previously been revoked, correct?

A. That's a fair way to characterize it. I think he was mistaken when he told the Court that, yes.

Q. You never stopped, though, to go check with Mr. Harker, Jones-Blair, O'Brien, to see whether or not he was mistaken, did you?

A. No, I didn't think I needed to under the circumstances.

Q. What circumstances were those?

A. The fact that I had had numerous conversations with Tim Harker, who I perceived and I believed clearly was the lead counsel in this matter; the fact that I had had a conversation [47] with him as late as the evening before the 27th and that there was no mention made of it; the fact that we spent probably in excess of two hours to three hours, either in this courtroom or in the Court's chambers or out in the hall, and if he was going to countermand these, he had every opportunity, in my view, to do it.

I think under all of those circumstances, that I felt that I didn't need to recontact Mr. Harker. Furthermore, it was my belief at this time that a settlement had taken place, because Cook Paint had settled.

Q. But you knew that you were the one that held the authority under Plaintiffs' Exhibit 1 to settle on behalf of Jones-Blair and O'Brien, correct?

A. Yes. I had conveyed these conditions to the HSC prior to that point in time. I think it is my view — if I can describe it this way — that once Cook Paint settled, then it is self-executing. Based upon this letter, the conditions were met, in my view.

Q. The subject of Plaintiffs' Exhibit 1 never came up in your conversation with Mr. Harker on the 26th, did it?

A. That's right.

* * *

[55] THE COURT: Redirect, if any.

MR. ROARK: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. ROARK:

Q. You stated this letter was no secret, at least as of Wednesday, March 27th, the conditions and terms of this letter was no secret?

A. That's true.

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Q. Did you perceive that the instructions to this letter, even though they were addressed to you, were confined to you and only you?

A. No.

Q. Did you perceive that letter to also advise you that Cook Paint was going to be negotiating with the HSC?

A. Yes.

Q. That Cook Paint would be aware of that position. You certainly assumed that, did you not?

A. I assumed it and I know that they were.

MR. BLACKBURN: Objection. Mr. Conger is a bright, articulate man and he can testify.

THE COURT: Overruled.

Q. This agitated conversation that you referred to in the hallway where Mr. Schulcz and Ms. Bunn and Mr. Condren were discussing the negotiations and advised you of some dispute, at that point in time was it your understanding that the HSC [56] and Cook Paint had already reached an agreement, and Mr. Schulcz was making his objection known then?

A. That's my understanding.

Q. When you talked to Mr. Tomlinson, or talked to me later in the day, that morning on the 27th, and made some reference about Jones-Blair and O'Brien's objection, that was immediately

before the parties were getting ready to go back in chambers to make the statements on the record, isn't that correct, is that your recollection?

A. I really do not recall precisely when I made that — had that discussion with either you or Bob Tomlinson.

Q. Okay.

A. I have no reason to believe that it wasn't beforehand, but I'm telling you I don't recall exactly.

Q. The statements and the transcript that Counsel went over with you where Mr. Schulcz was making his comments about on instructions from Mr. Harker, and so forth, and so on, and how he had been told to preserve the right to settle, and so forth — I mean, to try the case, this on-the-record conversation occurred after the off-the-record conversation?

A. Yes.

Q. In the off-the-record meeting with the Court, the Court had already indicated, based upon what it had heard, that it intended to rule and find that there was a settlement agreement; isn't that correct?

A. That was my understanding when we went on the record.

[Testimony by Christopher Condren
Direct examination by Mr. Roark]

* * *

[62] Q. During those days, March 25th, March 26th, was Mr. Art Schulcz present in Oklahoma City?

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A. He was.

Q. Were you in somewhat regular contact with him in person or by telephone while he was here and while you were also here getting ready for trial?

A. Some.

Q. In fact, I think at one point did you offer Mr. Schulcz the opportunity to come to your office?

A. Yes, I was hoping to get Mr. Schulcz to come to my office to work, because I wanted Mr. Conger to be able to give his uninterrupted attention to preparation of the defense of the case. We were all thinking the case was going to trial and I knew that some of the thoughts that Mr. Schulcz diverged from what Mr. Conger had. I wanted to get Mr. Schulcz in our library and provide him with our secretarial support staff so that it wouldn't in any way put any extra burden, or divert Mr. Conger and his staff's attention from the task at hand.

Q. During the time that you had contact, interaction with Mr. Schulcz on the 25th and the 26th, did the subject of this letter ever come up?

A. No.

Q. Did Mr. Schulcz ever make any statements to you whatsoever [63] on those two days with respect to the settlement positions or any change in settlement positions of Cook Paint, vis-a-vis Jones-Blair and O'Brien?

A. No.

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Q. Did you have any communications with Mr. Harker on the 25th or 26th?

A. I don't believe so.

Q. Now, let me ask you to look down in the lower left-hand corner of that letter where it shows who copies were sent to.

A. Yes, sir.

Q. The last name, Mr. Pat Curran?

A. His name appears on that letter.

Q. Who is he?

A. Mr. Curran is either the president or the chief executive officer of Cook Paint & Varnish Company. I believe him to be the head man there. I don't know precisely what his title is there, but I think he is the number one man at Cook Paint, but I don't know his precise title.

Q. When did you become aware, Mr. Condren, that the settlement between the HSC and Cook Paint would be tied to a settlement with Jones-Blair and O'Brien?

A. Well, on Monday and Tuesday, I believed that would likely happen. On Wednesday, it became a reality, Wednesday morning as we were discussing the settlement.

* * *

Q. [65] So when you went to Court on Wednesday morning,

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March [66] 27th, you believed that those settlements — the only real way the case was going to settle is if all three of these settlements were tied together, correct?

A. I thought that was going to happen.

Q. You were aware of the letter in front of you, Plaintiffs' Exhibit 1, correct?

A. Mr. Conger had talked to me over the phone and given me the precise details of this letter, including the fact that it had gone to Mr. Curran.

Q. What role or effect did this letter have in your thought process during the negotiations, the beginning of the negotiations, on Wednesday, March 27th?

A. Well, it was just felt to me, in my own mind, that Cook Paint was the focus of the entire proceeding; that whatever Cook Paint was going to do, would be either continue the case and have a trial, which I was fully expecting we were going to have a trial that morning when we showed up, or Cook Paint would settle the matter. That's the way I felt based upon this letter.

* * *

[68] Then the HSC came, and through a concession to Cook Paint, which Mr. Charles Whelen, an attorney in Dallas, advised [69] me would be coming, that basically if we would settle everything, the HSC would knock down our volume that would save Cook Paint and its insurance carrier $50 to $60,000. I had been told that was coming, to expect that during negotiations and that came in.

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I think you are the one that came in and said, "Why should we just settle, let's talk about settling the whole thing. We'll reduce your volume 5 to 7,000 gallons and that will save you $50 or $60,000."

Kathy Bunn made the calls to the various people to decide if Cook Paint wanted to do that, Cook Paint's carriers would do that. A decision was made that we would do that.

Q. So at that point during the negotiations, you reached an agreement with the Hardage Steering Committee on a number —

A. On a number.

Q. — to do the global settlement?

A. On a number to do the global settlement. That's when, I recall, that approximately during that time, you also — I believe it was you, Mr. Roark — told us that, "We'll do this deal, but you have to bring Jones-Blair and O'Brien along with you, because it is just as expensive for us to try the case against two of you as it is three of you."

Q. What was your response to that?

A. We could do that, because we have got this letter of March 22, 1991, where they had hitched their cart to our wagon. [70] That's essentially what I told you, is that they had agreed to that.

Q. At that point, the point that you reached the agreement with HSC and the number, did you believe that there was a settlement between Cook Paint and the HSC?

A. Yeah, I would just have to go tell Mr. Schulcz.

Q. Mr. Schulcz, I take it, was not involved in the negotiations that you have described between Cook Paint and the HSC and while Cook was talking to its insurance company?

A. No, he was not. He had — when we first talked about settling the response cost issue, he came out. When Kathy Bunn and I came out of Judge West's chambers, we went out in the hall. He came — said, "What are you talking about?" I said, "We are talking about a way to try to get the problem settled." We said, you know, "We are going to try to settle this allo — this response cost issue." He was upset that we were talking settlement at that point.

Q. Why did you — why did you perceive that he was upset about that?

A. He was really eager to go to trial. I think personally he wanted to try this case.

Q. Just personally as the lawyer involved?

A. I think he was upset, as any trial lawyer would be that has worked very hard getting ready for trial, that the case is going to be settled.

[71] Q. Did he ever say anything to you in that conversation that you just described, that initial statement, about the letter in front of you, one way or the other; whether it existed or whether it was any good?

A. The letter was never mentioned to Mr. Schulcz until I told him we were going to settle.

Q. After you had already reached an agreement?

A. After we reached agreement with the HSC and we went down from the elevators toward Judge Phillips, had a heated discussion. I said, "We have this letter; we are going to settle." He said, "The letter is no good." I said, "You just watch."

We went back to Judge West. Judge West was involved, and had a discussion, Mr. Conger was there, and I agreed with Mr. Conger's version of events. Judge West advised us that he was inclined to enforce the settlement, but he would want to do it on the record and give everyone a chance to have their say. Everyone had their say on the record and settlement was enforced.

Q. When he made the statement to you that the letter was no good, was that the first notice that you ever received from Mr. Schulcz where he even mentioned the letter or some change in position?

A. That's the first time that Mr. Schulcz and I had ever discussed anything with respect to the letter and the first [72] indication that I had had that Jones-Blair and O'Brien were maintaining that the letter was not valid.

* * *

[74] Q. Were you the lead — is it fair to say that you were the lead negotiator on Cook Paint's behalf with the HSC that morning, on the 27th?

A. That morning, yes.

Q. I would like to know from your standpoint in that role what

reliance did you place on the letter in front of you, Plaintiffs' Exhibit 1, when you began negotiations on the morning of the 27th?

A. Cook Paint was the target at that point. Cook Paint could, on its own, settle the balance of the case. That is the position I felt we had going in, that Cook Paint could control the destiny of the litigation. If we were forced to try to bring people along, as we ultimately were, we could. That's the way I felt that the — that's the way I felt during those negotiations, is that we had control of our own destiny. If there were any other conditions, such as being tied to make the other two settle, we could.

Q. How did you regard Mr. Schulcz's attempt that morning to repudiate the terms of that letter?

A. A day late, a dollar short; after the fact, that's how I regarded it. It was after the fact. From my prospective, it was after the fact. I agree with Mr. Conger that it is self-execution. Once the settlement was done by Cook Paint, Jones-Blair and O'Brien's decision was made.

* * *

[Testimony of Timothy L. Harker
Cross examination by Mr. Roark]

Q. Let's talk about the week of March 18th. Do you recall what transpired in connection with this matter during that week?

A. March 18th, I believe, is a Monday. Mr. Schulcz came to me on that Monday and said that Mr. Conger had just called Mr. Schulcz to report to him that there was a global settlement offer on the street from the Hardage Steering Committee for the de

minimis parties of a dollar a gallon and a separate and different offer for the non-de minimis parties, which I think would total up to approximately $600,000 for Cook Paint.

* * *

[136] Q. You are not disavowing today what that letter says, are you, sir?

A. If you read the letter to convey my intention, I don't disavow it. If you read it to convey what other people say they believe it meant, I certainly disavow that contention.

Q. That's not my question.

A. Rephrase it again, please.

Q. I think it was clear, let me try it again.

You are not disavowing your own handiwork there in Exhibit 1, are you, sir?

A. I'm not disavowing this letter.

Q. You wrote it, it says what you wanted it to say?

A. That's correct.

Q. It doesn't say anything in there about if Cook Paint settles, Mr. Conger, then somebody will tell you and then you can go settle on behalf of Jones-Blair and O'Brien, it doesn't say anything like that?

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A. In hindsight, it perhaps could say more; it doesn't say that.

Q. Thank you.

Now, you wrote — sent a copy of that to Mr. Curran, he is your client representative for Cook Paint, correct?

A. As I testified.

* * *

[143] Q. Okay. Did you tell Mr. Schulcz at some point early on that you would convey to Mr. Conger the change in position in Cook Paint, the change in position in that letter, Exhibit 1?

A. When I had talked to Mr. Schulcz on Monday morning, the 25th, indicated to him that Jones-Blair and O'Brien were going to proceed, irrespective of Cook Paint's decision with their insurance carrier, I intended to talk to Mr. Conger about his trial preparation. I believe I made some comment to Mr. Schulcz to the effect that if I talked to Mr. Conger, I will communicate that to him, but — may I finish? I'm not finished.

Q. I think it is a "yes" or "no" answer. I think you answered it.

A. I didn't complete my answer, but if that's what you wish.

Q. Sir, did you — you never had a conversation with Mr. Conger, did you, conveying to him a change in position in Exhibit 1?

A. No, I did not, because Mr. Schulcz had that conversation.

Q. Well —

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A. Was in his office when he had it.

[144] Q. You weren't present when Mr. Schulcz was allegedly talking to Mr. Conger, were you, on that Monday morning or Monday?

A. Was I in Oklahoma City, no, Mr. Schulcz was.

Q. You have no personal knowledge whether Mr. Schulcz had that conversation with Mr. Conger or not, do you?

A. I have only the knowledge that Mr. Schulcz promptly, after I had told him to convey that message to Mr. Conger, called me back and said that the message had been delivered.

Q. You don't know precisely what Mr. Schulcz told Mr. Conger, the conversation that he was referring to?

A. Not precisely; I do know what Mr. Schulcz told me.

Q. You don't have any personal knowledge about what was said by either gentlemen at this brief meeting they had on the 25th, do you?

A. Since I wasn't there, of course not.

Q. You didn't see fit to write Mr. Conger a letter on March 25th to revoke the authority of that March 22nd letter, did you, Mr. Harker?

A. I didn't write him a letter.

Q. It was important enough for you to put it in writing on the preceding Friday on March 22nd, wasn't it?

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A. Given the time pressure of the weekend and late Friday afternoon and the trial starting Monday morning and Akzo's decision to settle promptly and given Mr. Schulcz's statement and my directions to him, that he would tell Mr. Conger, who [145] was just down the hall, it was not necessary to put it in writing.

Q. Mr. Schulcz was in Mr. Conger's office when you spoke with him on March 25th?

A. That's correct.

Q. It would have been an easy matter to simply ask Mr. Schulcz to put Mr. Conger on the phone for you to talk to him directly, wouldn't it?

A. I don't know if that would have been logistically easy or logistically difficult. It was unnecessary; Mr. Schulcz was the spokesperson of the clients on the scene.

Q. You didn't ask to talk to Mr. Conger, did you?

A. I didn't call his firm and ask to talk to him that day. I did the next day. I indicated to Mr. Schulcz that I might be talking to him. If I did, I would also communicate to him that day, but that Mr. Schulcz should nevertheless go ahead and convey the message. After Mr. Schulcz told me he had conveyed the message, I did not further communicate with Mr. Conger.

Q. You did talk to him on the 26th, you said?

A. About trial preparation.

Q. You admitted very candidly that you had absolutely no

conversation with him whatsoever about this letter of March 22, correct?

A. That's correct.

* * *

APPENDIX IV — MOTION FOR RECUSAL FILED FEBRUARY 25, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-86-1401 P
(Appeal No. 91-6186)

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROYAL N. HARDAGE, et al.,

Defendants.

ADVANCE CHEMICAL COMPANY, et al.,

Hardage Steering Committee
Defendants and Third-Party Plaintiffs,

v.

ABCO, INC., et al.,

Third-Party Defendants.

28 U.S.C. § 455 MOTION FOR RECUSAL

The O'Brien Corp. ("O'Brien") and the Jones-Blair Co. ("Jones-Blair") hereby move under the provisions of 28 U.S.C. §455(a) that the Honorable Lee West of the U.S. District Court for the Western District of Oklahoma recuse himself from the further proceedings in this matter. This motion is based on the following series of actions and inactions by Judge West that cast doubt on

his impartiality towards O'Brien and Jones-Blair.

a. In ordering a settlement by O'Brien and Jones-Blair over the objection by their attorney who was present before the court, Judge West said, "The Court is not about to undertake a trial of this magnitude and size on behalf of two *de minimis* parties." Transcript, 3/27/92 hearing, p. 22 (Exhibit A).

b. Prior to ordering O'Brien and Jones-Blair to settle, the District Court in *United States v. Hardage*, 750 F.Supp. 1460, 1515-19 (W.D. Okla. 1990) (the "Hardage Remedy Trial"), had denied the majority of the HSC's $9.5 million response cost claims against the United States because the claims were for non-recoverable expenses related to litigation and were not consistent with the National Contingency Plan ("NCP").[1] *Id.* O'Brien and Jones-Blair (and other third-party defendants) then filed three timely, fully briefed dispositive motions for the court to dispose of the Hardage Steering Committee's ("HSC") response cost claims against "O'Brien and Jones-Blair by relying on the ruling and result of the district court's judgment rejecting the HSC's response cost claims against the United States. Judge West failed to rule on any of the three dispositive motions, thereby forcing the matter to trial; yet, on the day of trial, Judge West ordered O'Brien and Jones-Blair to settle on terms that were offered by the HSC but were unacceptable to O'Brien and Jones-Blair.

1. On September 25, 1991, O'Brien and Jones-Blair (and all third-party defendants) moved for partial summary judgment on the amount of the HSC's response cost claims, arguing that the trial court's decision approving only $3,716,695 of the $9.5 million HSC claim had made the

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1. The Tenth Circuit recently affirmed that decision on December 21, 1992, Appeal No. 90-6325. The HSC has requested rehearing en banc.

issue of the HSC's response costs *res judicata*. Doc. No. ("Doc.") 3683, 3699, 3732, 3706 (Vapor Extraction Group Defendants).

2. On October 12, 1990, O'Brien and Jones-Blair also moved for partial summary judgment on the HSC's response cost claim based on the collateral estoppel (issue preclusion) arising from the district court's examination of the HSC's response cost claims against the United States and rejection of the majority thereof, and deposition testimony from the HSC showing that the claims against third party defendants were the same as those made against the United States. *See* Doc. 3911-12.

3. On January 7, 1991, O'Brien and Jones-Blair (and the third-party defendants) made another motion for partial summary judgment on the grounds that the HSC's response cost claim, except for the amount approved by the district court in the Remedy Trial (750 F.Supp. at 1519 failed to meet the requirements of the NCP and was not recoverable. Doc. 6153, 6154.

C. Judge West also failed to rule on two other dispositive motions filed by O'Brien and Jones-Blair: (1) reconsideration of the court's 9/22/89 decision allowing the HSC's claims to survive the CERCLA § 122(g), 42 U.S.C. § 9622(g), *de minimis* settlement which O'Brien and Jones-Blair had signed with the United States; and (2) dismissal of the HSC's response cost claims as a sanction for misrepresentation before the Court at the 9/22/89 hearing.[2] *See* Doc. 3928, 3947 (Order allowing filing of brief).

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2. When asked by the Court the size of its response cost claim against the *de*

(Cont'd)

Appendix IV

d. On March 27, 1991, in explaining why the Court was ordering settlement and would not allow O'Brien and Jones-Blair to have a trial, Judge West said, "Costs would very quickly exceed any amount in controversy as between them and certainly exceed any differences in their position now from the time that that was stated." Tr. 3/27/91 at 22. Had the court ruled on the pending dispositive motions, the trial might well have been vastly reduced in scope or completely eliminated.

The Tenth Circuit has recently ordered the District Court to conduct a hearing concerning whether on March 27, 1991, when Judge West imposed a settlement, liaison counsel had authority to settle on behalf of O'Brien and Jones-Blair. The decisions and actions above appear to evidence either a disregard for the rights of O'Brien and Jones-Blair to an impartial adjudication of their claims under the law, a prejudgment against the merits of their claims, or a bias against them and for the HSC. Consequently, O'Brien and Jones-Blair "harbor doubts about [Judge West's] impartiality", *Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987), in such a hearing, and for these reasons and as explained more fully in the accompanying memorandum respectfully request that Judge West recuse himself from this case.

Respectfully submitted,

s/ Arthur A. Schulcz, Sr.
Arthur A. Schulcz, Sr.

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minimis parties, the HSC said it was the same as their claim against the United States, about $10 million. Tr. 9/22/89 at 51. However, shortly thereafter, the HSC asserted response cost claim of $34 million and then $55 million ($34 million plus a "free rider" penalty).

Appendix IV

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Dated: February 24, 1993